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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,

Petitioner,

v.

SUZUKI MOTOR CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, this Court held that defamatory speech regarding public officials and public figures is actionable only if the plaintiff proves by "clear and convincing evidence" that the publisher spoke with "actual malice" – *viz.*, that the publisher either lied or entertained serious doubts about the truth of its statements. In *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), this Court held that the court must "independently examine" the "*whole* record" to determine for itself both (i) whether there is sufficient evidence of actual malice, and (ii) whether the plaintiff's theory must be rejected as a basis for imposing liability because it would intrude too severely upon First Amendment freedoms.

The questions presented by this case are:

1. Whether and to what extent the "independent examination" rule of *Bose Corp.* v. *Consumers Union* applies to a court's disposition of a publisher's motion for summary judgment.

2. Whether the First Amendment permits an inference of "actual malice" to be drawn from (i) the publisher's substantive and well-articulated disagreement with the government, or (ii) the publisher's financial status.

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Consumers Union of United States, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Consumers Union of United States, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

The Appendix reproduces the amended panel opinions (App. A, 330 F.3d 1127), the order denying rehearing en banc with accompanying dissent (App. B, 330 F.3d 1110), and the district court's opinion (App. C) and findings of fact and conclusions of law (App. D). The court of appeals denied rehearing en banc on May 19, 2003. Pet. App. 47a. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I.

STATEMENT OF THE CASE

This case presents two fundamental and recurring questions of First Amendment law relating to the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In *Sullivan* and its progeny, this Court held that defamatory speech regarding public officials and public figures is actionable only if the plaintiff proves by "clear and convincing evidence" that the publisher spoke with "actual malice" – *viz.*, that the publisher either lied or entertained serious doubts about the truth of its statements. In *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), this Court held that the court must "independently examine" the "*whole* record" to determine for itself both (i) whether there is sufficient evidence of actual malice, and (ii) whether the plaintiff's theory must be rejected as a basis for imposing liability because it would intrude too severely upon First Amendment freedoms. "The question whether the evidence in the record in a defamation case is sufficient to support a

finding of actual malice is a question of law." *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 685 (1989).

Bose was a post-trial appeal, and this Court has not decided whether and to what extent the "independent examination" rule applies to a publisher's motion for summary judgment. Over the dissent of Judge Kozinski for *eleven* judges, who called the decision a "grievous[]" error and invited review by this Court (Pet. App. 50a, 55a), a divided panel of the Ninth Circuit became the first court to hold that, on summary judgment, the independent examination rule permits the court to consider only whether a "plausible" reading of the plaintiff's own evidence in isolation – *i.e.*, without regard to even the undisputed record facts supporting the publisher – might lead a jury to find clear and convincing evidence of actual malice. *Id.* 16a.

The Ninth Circuit majority separately held that a publisher's substantive and well-articulated disagreement with the government can establish clear and convincing evidence of actual malice, reasoning that disagreement with the government represents the "purposeful avoidance of the truth." Pet. App. 23a. The Ninth Circuit also held that an allegation that the publisher was financially overextended could support a finding of actual malice because it gives the publisher an incentive to engage in false and inflammatory speech. *Id.* 22a.

This petition accordingly presents the questions (i) whether and to what extent the *Bose* "independent examination" rule applies to a court's evaluation of a publisher's motion for summary judgment, and (ii) whether the theories of liability endorsed by the court of appeals in this case unduly intrude on First Amendment freedoms.

1. Petitioner Consumers Union of United States, Inc. (CU) is the not-for-profit publisher of *Consumer Reports*, the nation's most respected consumer publication. As Judge Kozinski recognized, "A significant portion of the American public relies on CU's ratings on a regular basis, and almost everyone consults *Consumer Reports* now and then before making a significant purchase – whether a sound system, a dishwasher or a car." Pet. App. 49a.

The integrity of CU – which accepts no outside advertising, no product samples, and no corporate sponsorship – is vital to its mission of advising consumers through credible, independent product reviews, and has long been reaffirmed by the courts. CU's "most important asset is its good name for independence and accuracy; its reputation as an impartial and untainted adviser is the foundation upon which the public's confidence rests." *Consumers Union* v. *Theodore Hamm Brewing Co., Inc.*, 314 F. Supp. 697, 700 (D. Conn. 1970). See, *e.g.*, *Bose Corp.*, *supra*; *Cranberg* v. *Consumers Union*, 756 F.2d 382 (CA5), cert. denied, 474 U.S. 850 (1985); *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932 (CA2), cert. denied, 449 U.S. 839 (1980); *Quantum Elecs. Corp.* v. *Consumers Union*, 881 F. Supp. 753 (D.R.I. 1995); *Simmons Ford* v. *Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981). Nonetheless, because CU is so widely read and respected, and its reviews are so complete and candid, it "attracts lawsuits like moths to a lantern" from "disgruntled CU reviewees seeking revenge through the courts." Pet. App. 54a, 69a (Kozinski, J.).

This lawsuit arises from a *Consumer Reports* review that concluded that the 1988 "Samurai," a sport-utility vehicle (SUV) manufactured by respondent Suzuki Motors, was "Not Acceptable" because of its propensity to severely tip up on two wheels in emergency maneuvers. CU tested four SUVs, including the Samurai, which as respondent admits was by then "already attracting controversy" (Resp. C.A. Br. 2) amidst emerging public concern that SUVs had a disproportionate life-endangering tendency to tip up and roll over. In a detailed 6500-word review published in July 1988, CU concluded that, "[i]n our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use." Pet. App. 241a. (CU's findings, as well as the full disclosure of its testing, are set out in the review, which is reproduced as Appendix E.) Suzuki threatened suit at the time, but never took any action.

CU republished its conclusion regarding the Samurai at least *twenty-four times* between 1988 and 1995. Pet. App. 166a ¶¶ 318-22. Suzuki neither sued nor even complained.

In 1996, CU made the two statements now at issue. The January 1996 sixty-year commemorative issue of *Consumer Reports* noted sixty significant consumer events since 1936. One was a thumb-nail-sized photograph taken of the Samurai tipping up severely, accompanied by the following text: "*1986* CU buys its own auto test track in rural Connecticut. Two years later based on tests conducted there CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable." App. J, 35a.

The second statement appears in a 1996 CU Background Paper for press inquiries: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." See Pet. App. 34a.

2. Though by 1996 it was no longer selling the Samurai in the U.S., Suzuki responded by filing this product disparagement action in California. Suzuki's fanciful theory is that CU and its employees in 1988 – *i.e.*, eight years before the statements now at issue – formed a secret conspiracy to rig a test that would cause the Samurai alone to tip up, so that CU could publish a negative review of that vehicle, so that sales of *Consumer Reports* would go up, so that CU could finance a capital campaign, all without being discovered, which would have destroyed the public credibility that has always been the *sine qua non* of CU's existence.

Suzuki took exceedingly wide-ranging discovery and the parties compiled a "voluminous record." Pet. App. 78a. Suzuki deposed virtually every person even remotely involved with the testing of the Samurai and the researching, writing, and editing of the review. Those deposed ranged from the facilities manager of the test track to the President of Consumers Union; from the most junior auto technician to the head of the auto test division; from an editorial researcher to the editorial director of *Consumer Reports*. Together, the parties took more than fifty depositions. Suzuki also sought and obtained the complete test and editorial

files not only for the 1988 article, but also for every vehicle ever tested by CU in a similar manner. This amounted to tens of thousands of documents, videotapes, and other records. After the completion of all discovery, the parties in their summary judgment filings distilled this massive amount of evidence to thirty-one declarations and 390 exhibits. The record on appeal contains nearly 7000 pages.

The district court granted CU's motion for summary judgment, entering an opinion (App. C) and hundreds of findings of undisputed fact (App. D). Because Suzuki is a public figure and the SUV safety controversy is a matter of high public importance, the court held that Suzuki's disparagement claim is subject to heightened First Amendment protections. Although factual findings in ordinary civil litigation are reviewed for "clear error," *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), requires judges in cases subject to the First Amendment protections of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to undertake an "independent examination" of the question of actual malice. *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), holds that courts must apply the "clear and convincing evidence" standard in evaluating a defendant-publisher's motion for summary judgment.

The district court held that, under the "independent examination" rule of *Bose*, it was required to determine not merely whether there was a factual question for the jury but whether, as a matter of law, the evidence could support a finding of actual malice. Citing *Anderson* v. *Liberty Lobby*, the court "viewed all the evidence in the light most favorable to plaintiff," but "compress[ed] cartloads of evidence *into a legal conclusion*." Pet. App. 83a (emphasis added). The court accordingly "exercise[d] independent judgment and determine[d] whether the record establishes actual malice with convincing clarity." *Id.* 82a (quoting *Bose*, 466 U.S. at 514).

The district court rejected Suzuki's contention that the court could examine only the "evidence that *it* [Suzuki] ha[d] presented," which it had "culled" from the voluminous record, recognizing instead that a court is required to consider "*all* the evidence." Pet. App. 78a, 80a, 83a (emphases added). The

"context" of the events, rather than isolated excerpts, was thus highly relevant. *Id.* 83a.

The district court found no genuine dispute regarding hundreds of facts refuting Suzuki's speculation that CU had rigged the tests of the Samurai. A substantial body of undisputed evidence documented CU's good faith: In sum, CU "believed at the time it published the article and still believes that the article was truthful, accurate, and fair." Pet. App. 146a ¶ 238. See also *id.* 140a-142a ¶¶ 217-23.

The district court found it undisputed that CU knew, before its own testing, that the Samurai was the subject of serious allegations that the vehicle posed rollover dangers. Pet. App. 109a ¶ 86. For example, the *New York Times* reported a "feeling of instability at speed and in the curves" and that the vehicle was "fairly tipsy"; the *Washington Post* reported a near roll-over during testing; the *Philadelphia Daily News* called "a sudden, abrupt maneuver at speed" in the Samurai "courting Highway Hari-Kari"; the *St. Petersburg Times* reported that some insurers were refusing to cover the Samurai.

NBC-TV also aired a three-part series quoting experts describing the Samurai's dangerousness and showing video clips that "vividly depicted the Samurai tipping up during test maneuvers." *Id.* 101a-102a ¶¶ 53-56, 107a-109a ¶¶ 74-85. CU's concerns after viewing the NBC program that its staff could be injured were so substantial that it added safety "outriggers" (essentially, training wheels) during emergency handling tests of the Samurai. *Id.* 109a-110a ¶¶ 87-88.

The district court found it undisputed that these criticisms were confirmed during the standard preliminary "break-in" period of CU's testing. The Samurai purchased by CU rolled over on a snow-covered gravel road while traveling *at only fifteen mph*. Pet. App. 104a-106a ¶¶ 63-71.

CU has been testing automobiles for decades. As the district court found undisputed, the engineers, researchers, writers, editors, and executives involved in CU's testing and publishing (including with respect to the Samurai) are all trained professionals, most with advanced degrees and years of experience. Pet. App. 90a-94a ¶¶ 12-19, 97a ¶ 38. Since 1973,

one of CU's principal safety tests for automobiles (known as the emergency avoidance maneuver or "long course") has involved drivers steering quickly around an obstacle on a course defined by cones. That test measures the vehicle's response to emergency steering, especially at the limits of the vehicle's handling ability, and was not designed to assess a vehicle's propensity to roll over. *Id.* 98a-101a ¶¶ 43-50, 52.

The Samurai performed well during the traditional emergency avoidance maneuver steering test conducted by two professional drivers – so well that concerns over the safety of CU's test drivers were allayed and the safety outriggers were removed for the second driver's testing. Pet. App. 111a-113a ¶¶ 97-104. That might have been the end of the matter, but for the fact that, with the outriggers still removed, CU's technical director, Dr. R. David Pittle, sought to perform the test on both the Samurai and the Wrangler. *Id.* ¶ 105. On his tenth run through the course with the Samurai, he made a slight steering misjudgment, and the vehicle lifted onto two wheels, which the district court found was indisputably "a startling and unexpected occurrence." *Id.* 114a-115a ¶¶ 108-16.

CU then adjusted the course to duplicate the path of Pittle's tenth run to determine whether the tip-up reflected a flaw in the SUVs that was not detected initially. This adjusted "short course" required the test driver to make sharper turns at somewhat slower speeds. Pet. App. 115a-116a ¶¶ 117-20. The district court found it undisputed that CU's adoption of the short course reflected *not* an attempt to disparage Suzuki or the Samurai but instead an effort to fulfill "its mission [of] protecting the consumer, * * * particularly given the background information already known about the Samurai." *Id.* 83a.

When driven on the short course, the Samurai lifted onto two wheels multiple times. Pet. App. 118a-120a ¶¶ 129-36. CU tested three other SUVs under identical conditions; *none* tipped. *Id.* 121a ¶¶ 137-39, 125a ¶¶ 153-56. After learning that Suzuki offered a new 1988½ Samurai, CU purchased and tested that as well. Like the 1988 Samurai, this newer model tipped multiple times. *Id.* 122a-124a ¶¶ 140-51.

The district court found it undisputed that CU's conclusions about the Samurai were confirmed by several independent events subsequent to 1988 but prior to CU's 1996 statements at issue in this case. Suzuki itself had never sued after either the initial review or the twenty-four published reiterations of CU's findings from 1988 to 1995, facts that "strengthened CU's belief in the validity of CU's reports on the Samurai." Pet. App. 166a ¶¶ 321-22. An English consumer testing organization found that the Samurai had a propensity to roll over in emergency maneuvers. *Id.* 150a-153a ¶¶ 257-65. The Attorneys General of seven states charged Suzuki with false and misleading advertising regarding the Samurai's rollover potential. Suzuki settled, including by paying a $200,000 fine and agreeing to include safety warnings in its advertising. *Id.* 159a ¶¶ 282-83. In a rollover product liability case, a federal judge entered a default judgment against Suzuki for deliberately covering up evidence of the Samurai's danger, a sanction the Eleventh Circuit affirmed as "richly deserved" because respondent and its lawyers "engaged in an unrelenting campaign to obfuscate the truth" and made a "bad faith decision to avoid revealing the truth at all costs." *Malautea* v. *Suzuki Motor Corp.*, 148 F.R.D. 362, 365 (S.D. Ga. 1991), aff'd, 987 F.2d 1536, 1541-42, 1544 (CA11), cert. denied, 510 U.S. 863 (1993). See Pet. App. 161a-163a ¶¶ 291-95, 298-300.[1]

The district court concluded that, in the context of this record, a jury could not find by clear and convincing evidence that CU had acted with actual malice. The foregoing evidence completely overwhelmed the isolated assertions put forward by Suzuki, which rested on circumstantial allegations and were contrary to the record as a whole:

- Suzuki argued that the Samurai passed CU's traditional avoidance test and tipped up only on a course designed to replicate the path taken by Dr. Pittle. Pet. App. 83a. The district

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[1] In the May 1992 *Consumer Reports*, CU reported on the court ruling, stating that Suzuki knew about the rollover defect before selling the Samurai in the United States. See App. H. Suzuki neither complained nor sued CU.

court found it undisputed, however, that the short course was not implemented to impugn the Samurai but to "determine if the results [of the Pittle tip-up] were an aberration or if the Samurai and all or some of the other SUVs tested would experience rollovers." *Id.* 115a ¶ 118. The court found it undisputed that "[*t*]*here is no evidence*" that CU's drivers attempted to tip the Samurai. *Id.* 126a ¶¶ 158-59 (emphasis added).

- Suzuki pointed to four comments by CU's staff during the testing: "If you can't find someone to roll this car, I will" (allegedly stated by CU's Editorial Director); "I think I got that, I think I got that!" (staff member upon seeing Pittle's tip-up); "All right Ricky baby!" (staff member upon seeing tip-up and safe landing); and "Can't you just see it, we get no lift off the ground, Oh God" (Pittle in later preparing to video-tape a test of the newer 1988½ Samurai). Pet. App. 79a-80a. But the district court concluded that there was "no evidence that anyone instructed [the drivers] to deliberately tip up the Samurai." *Id.* 116a ¶ 121. And there was no dispute that staff had cheered on the runs by Pittle (who was not a trained test driver) in which *no* tip occurred. *Id.* 114a ¶ 112.

- Suzuki noted that the Samurai review was drafted before CU's auto test division submitted a report on the test results and before all the testing was completed on the other SUVs. Pet. App. 79a. The district court found no dispute, however, that this drafting process for the review was actually used "to bring to bear [CU's] highest level of editorial oversight, skill, and experience." *Id.* 133a ¶ 182.

- Suzuki pointed to the assertion of the National Highway Traffic Safety Administration (NHTSA) – in its denial of a petition filed by the Center for Auto Safety seeking a defect investigation of the Samurai – that CU's testing was too driver dependent. Although NHTSA found that "CU and [NBC's] tests raised some concern" about the Samurai, it opined that CU's testing was too influenced by driver variability. There was no dispute, however, that "CU's engineers and research[ers] analyzed NHTSA's published denial and disagreed substantively with NHTSA's ruling and written decision," subsequently "publish[ing] an article expressing [CU's] disagreement" and

openly addressing those disagreements multiple times. Pet. App. 155a-158a ¶¶ 272, 275, 279-81, 184a-189a ¶¶ 391-92, 394-402; see also App. G, I (reproducing CU's internal analysis and its published response). The district court recognized that "CU's difference of opinion" with NHTSA could not "compel the trier of fact to conclude that" CU was "intent upon deliberate or reckless falsification," especially since "part of the First Amendment's protection has to do with disagreeing with the government." *Id.* 84a. Further, "*NHTSA was misled by Suzuki* in 1988 as to the scientific and real-world nature of CU's short course avoidance maneuver test" (*id.* 84a ¶ 376 (emphasis added)), and other auto manufacturers "use the CU long course and short course avoidance maneuvers tests" (*id.* 181a ¶ 381). Therefore, the court concluded that CU did not "purposefully avoid" the truth. *Id.* 84a.[2]

• Suzuki argued that CU was financially overextended eight years before the statements now at issue, and that CU had referred to its findings regarding the Samurai in fundraising. Pet. App. 80a. The district court found it undisputed that CU did not attempt to manipulate the testing for any reason, including for fundraising. See *supra* at 6-7. Further, even if "relevant," a "goal of increasing one's profits through publishing material is not sufficient to prove actual malice." Pet. App. 84a (citing *Harte-Hanks*, 491 U.S. at 667).

3. Suzuki appealed, arguing that *its* evidence precluded summary judgment. Suzuki's opening brief thus omitted *any* reference to, for example, the newspaper and television reports finding that the Samurai presented a rollover danger; the fact that CU's own test Samurai rolled over in normal use at only 15 mph; the findings of other organizations and courts subsequent to 1988 that confirmed CU's conclusions; the fact that Suzuki had been sued by seven states over the rollover danger; the fact that a court had found that Suzuki had covered up the rollover risk; or CU's publication of a detailed response to NHTSA's

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[2] To the extent other governments agreed with NHTSA, the district court found it undisputed that CU was unaware of that fact. Pet. App. 173a ¶ 338.

disagreement with CU's testing protocols. Suzuki thus relied on Ninth Circuit precedent holding that "summary judgment should be denied where *the non-movant* presented evidence 'from which a jury *might* return a verdict in its favor.'" Resp. C.A. Br. 33 (citations omitted) (first emphasis added) (brackets omitted). "Thus, a reviewing court must assess all the evidence presented by *the non-moving party* in the aggregate and determine whether *that evidence*, viewed in its 'totality,' would be sufficient to support a jury finding." *Id.* (emphases added).

A divided panel of the Ninth Circuit agreed with Suzuki's argument that only its own evidence was relevant and reversed (Pet. App. 2a-35a) over bitter panel (*id.* 36a-46a) and en banc dissents (*id.* 48a-73a).

a. The panel majority held that CU should have been denied summary judgment with respect to its two 1996 statements that CU in 1988 had "discovered that the Suzuki Samurai * * * showed a propensity to roll over" and "discover[ed] that the Suzuki Samurai easily rolls over in turns." Pet. App. 34a-35a (Graber, J.) (emphasis omitted). In the court of appeals' view, "a rational jury [could] find, by clear and convincing evidence" (i) "that CU developed the short course *before* discovering a rollover 'propensity' and *in order to create* a rollover propensity, not *because of* it," and (ii) "that what CU discovered was that the Suzuki Samurai did *not* roll over 'easily' in turns, but had to be coaxed." *Id.* (emphases in original).[3]

In reaching that conclusion, the Ninth Circuit rejected the district court's legal standard. Whereas the district court had held that the *Bose* independent examination standard was fully applicable on summary judgment (see *supra* at 5), the panel majority held that that test applies only to "the review of a

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[3] Judge Tashima's majority opinion set forth the court's legal standard and cited the evidence submitted by Suzuki that supposedly could establish actual malice. Pet. App. 2a-29a. Judge Graber concurred in part, joining Judge Tashima's discussion of the legal test and the "evidence detailed" therein. *Id.* 30a-35a. But Judge Graber specified that Suzuki survived summary judgment only as to the two statements discussed in the text. *Id.* 34a-35a.

judgment rendered after trial." *Id.* 16a n.10. See also *id.* 32a (Graber, J.) ("courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial"). The majority held that "independent examination" at the summary judgment stage is limited merely to "review[ing] the district court's decision de novo," *i.e.*, without "deference." *Id.* 14a (citations omitted). The only question for the court on summary judgment, the majority concluded, was whether Suzuki had itself isolated "adequate evidence," a "plausible" reading of which could lead a reasonable jury to conclude "that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, that is not a question to be resolved here." *Id.* 20a. The majority concluded that its far less rigorous standard of review was required by this Court's statement in *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 249 (1986), that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Applying these standards, the majority held that, from the evidence presented by Suzuki, "a reasonable jury could find by clear and convincing evidence that CU had a high degree of awareness of the probable falsity of its statements about the Samurai." Pet. App. 19a. The majority saw two "plausible view[s] of the evidence" presented by Suzuki: (i) that "CU acted in good faith as a skeptical consumer watchdog should"; or alternatively (ii) that "CU 'rigged' a test to achieve a predetermined result in order to serve its own pecuniary interests." *Id.* 16a. According to the majority, "it is not our role, at this stage, to take sides" because "a jury would be entitled to believe the latter view of the evidence." *Id.*

The majority acknowledged that, at the time of the CU testing, the Samurai not only had "been the subject of news stories that highlighted its instability and propensity to tip over" but also had tipped over at only fifteen mph during CU's own

routine use. *Id.* 3a & n.2. But the court of appeals deemed those facts (and *all* of the other undisputed facts found by the district court) irrelevant given the case's procedural posture. The majority held that it was required to consider in isolation only the following facts that Suzuki had culled from the voluminous record: One witness testified to hearing the "[i]f you can't find someone to roll this car, I will" statement; Pittle then drove "the Samurai, tipping the vehicle after 10 runs to a cheer from a CU onlooker"; and CU "modified the long course, which it had used since 1973, to replicate the Pittle situation and then resumed its testing of the Samurai until it tipped up—again eliciting statements that can be construed as expressions of satisfaction." *Id.* 20a-21a. According to the majority, "This evidence is adequate to preclude summary judgment." *Id.* Notably, the majority omitted any reference to, and made no attempt to evaluate, the voluminous contrary evidence that the district court found "undisputed" and dispositive.

The majority also uncritically accepted Suzuki's hypothesis that in 1988 – well before the publications now at issue – CU "needed a blockbuster story to raise CU's profile and increase fundraising revenues." Pet. App. 22a. The only so-called "evidence" of this theory was that "CU had incurred substantial debt for a new headquarters building" at roughly that time and that CU mentioned the Samurai "in its fundraising solicitations." *Id.* The majority nonetheless deemed those facts – in isolation from all the evidence of CU's good faith, thorough reporting, and integrity – "sufficient circumstantial evidence of a financial motive" "to support the ultimate conclusion of actual malice" because it "dovetails" with Suzuki's theory of "test-rigging." *Id.*

The majority finally held that Suzuki could independently prevail on its theory that "CU failed to act reasonably in investigating and responding to contrary studies" performed by NHTSA "in a manner that suggested [CU] was attempting purposefully to avoid discovering the truth of the matter." Pet. App. 28a. "The issue is whether CU, armed with the knowledge that its tests were potentially flawed in this way, failed reasonably to investigate in such a manner that could lead a jury to conclude by clear and convincing evidence that CU was

aware of the falsity of its Samurai report." *Id.* 29a. The majority acknowledged – but deemed irrelevant – that "CU challenged the NHTSA report *head on*, stating its disagreement *in detail* and supporting its alternative conclusions *with substantive justifications*." *Id.* 28a (emphases added). But treating the issue as a factual one, rather than as a complex dispute on which experts disagree, the majority reasoned that it was required to "[d]raw[] all reasonable inferences in favor of Suzuki" on this point, such that "CU's failure to address this [supposed] deficiency with its testing procedure could lead a jury to conclude that it was aware that doing so would disclose the falsity of its negative Samurai rating." *Id.* 29a.

b. Judge Ferguson filed a panel dissent. He explained that the case directly implicated "the ongoing debate among courts and legal scholars regarding the applicability of the 'independent examination' rule to appeals from summary judgment motions" (Pet. App. 37a) and that the majority's decision conflicted with how "the independent examination rule has been applied at the summary judgment stage by other circuits" (*id.* 44a). He agreed with those circuits' holding that "the procedural protection of the independent examination rule is necessary not only for appellate review of post-trial decisions, but also for appellate review of summary judgment decisions" in cases governed by the actual malice standard. *Id.* 39a. The majority, by contrast, adopted a standard that avowedly "differs in no meaningful respect from an ordinary summary judgment appeal." *Id.* 40a.

Judge Ferguson explained that the independent examination rule requires the court to evaluate a publisher's summary judgment motion based on the "evidence in the record as a whole," not the evidence isolated by the plaintiff. Pet. App. 40a. "Because the independent examination rule allows us to view all of the evidence, and not just that which favors the plaintiff, we give maximum protection to the First Amendment." *Id.* 44a. Certainly, Judge Ferguson explained, a jury could not find "clear and convincing" evidence of actual malice on the whole record: The alleged comments of the CU staffers and the changed course design on which Suzuki and the majority principally relied are "completely consistent with the benign explanation

that [CU was] simply seeking confirmation of the existing accusations of rollover propensity," or at most "give rise to an inference of bias" as distinct from "actual malice." *Id.* 42a.

c. Judge Kozinski filed a stinging dissent on behalf of eleven judges from the denial of rehearing en banc. Pet. App. 48a-73a. They viewed the panel majority's principal legal error as its failure to recognize that the independent examination rule articulated by this Court "'assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact,'" as if the case were "the same as a slip-and-fall." *Id.* 50a (quoting *Bose*, 466 U.S. at 501). Judge Kozinski explained the judge's role on summary judgment in a case governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as follows:

> Where there are genuine evidentiary disputes over particular factual predicates of actual malice – such as questions about a witness's credibility – the issue is for the jury. The judge does not weigh the evidence to find those historical facts, but instead makes a routine sufficiency determination. After resolving the predicate factual disputes in the plaintiff's favor, however, the judge must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." And *that* process is not a routine sufficiency determination, because it *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.

Pet. App. 51a-52a (quoting *Bose*, 466 U.S. at 514) (other citations omitted) (alterations and emphases in original). On the panel majority's contrary view that "summary judgment is now governed by [a more lenient] standard, while our review after a jury verdict is governed by another" more rigorous standard, cases will "often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*." *Id.* 53a.

Judge Kozinski explained that, even if Suzuki's isolated evidence might hypothetically persuade a jury, judges conducting an independent review recognize that, "[t]o be probative of actual malice, evidence must have at least some tendency to exclude obvious innocuous explanations for the

defendant's conduct." Pet. App. 62a. Suzuki's evidence did not meet that standard. "Adjusting test procedures to better detect a risk arising from new consumer preferences is hardly reprehensible. It is precisely what one would expect from researchers seriously interested in consumer safety." *Id.* 61a. The alleged comments by CU staff members – even if true – were consistent with the fact that "the Samurai had already been slammed in the press for its rollover propensity, had been the target of a safety complaint filed with NHTSA and had rolled over on its side while a CU employee drove it at only 15 mph." *Id.* 62a. But in any event, "these fleeting remarks – three of which are no more than inane schadenfreude – would still be insufficient to support a finding of actual malice." *Id.* 63a.

According to Judge Kozinski, the majority's further reliance on CU's disagreement with NHTSA conflicts with the Second Circuit's requirement that a plaintiff must show that "bias was coupled with 'an *extreme* departure from *standard* investigative techniques.'" Pet. App. 64a (quoting *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174 (CA2 2001) (emphasis in Kozinski opinion)). Beyond offering a detailed response to NHTSA, Judge Kozinski asked, "what was CU supposed to do?" *Id.* 65a. "What the majority calls 'actual malice' is really just one side of a long-running debate over how to test rollover propensity most effectively." *Id.* 66a. "Which method gives the optimal mix of advantages and disadvantages is a point of disagreement among Congress, NHTSA, CU and others. It should be resolved by scientists, policymakers and consumers, not crushing libel verdicts." *Id.* 68a.

With respect to CU's alleged financial status, Judge Kozinski finally explained that, even if it were persuasive to a jury, *judges* recognize that such evidence does not tend to exclude the conclusion that a publisher acted in good faith, particularly given that "[m]any public interest groups are thinly funded, and their experiments are necessarily full of imperfections. Their targets can now stuff unflattering results into a scientific oubliette just by pointing out sources of experimental error and then threatening to sue if the groups don't 'investigate' and 'address' them. Today it's Consumers

Union panning the Samurai; tomorrow it could be Greenpeace claiming that some oil refinery is killing fish." Pet. App. 69a.

To the extent this Court's precedents could be read to permit cases like this one to go to trial, the en banc dissenters explained that this "Court would do us all a great favor by explaining that it intended no such absurdity." Pet. App. 55a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates An Important Conflict Over Whether And To What Extent The First Amendment Protections Of The "Independent Examination" Standard Apply To A Publisher's Motion For Summary Judgment.

The Ninth Circuit holds that the protections embodied in the "independent examination" rule of *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), apply only to "the review of a judgment rendered after trial." Pet. App. 16a & n.10. Judicial review at the summary judgment stage is limited to reviewing the record to identify evidence *favoring the plaintiff*, and to "review[ing] the district court's decision de novo," *i.e.*, without "deference," in order to determine whether "there is adequate evidence to support" the plaintiff's position. *Id.* 15a, 20a. On that narrow view of the First Amendment's protections, the court considers only whether a jury could "plausibl[y]" find that the plaintiff's proof alone provides clear and convincing evidence of actual malice. *Id.* 16a.

As Judge Ferguson recognized, that holding gives rise to an important conflict with how "the independent examination rule has been applied at the summary judgment stage by other circuits." Pet. App. 44a. The conflict is intolerable because irreconcilable positions are taken by the courts with jurisdiction over the nation's two leading media centers: The Second Circuit's adoption of the *Bose* independent examination rule on summary judgment encompasses the publishing houses of New York, while the Ninth Circuit's rejection of the rule encompasses West Coast publishing. This disparity creates confusion and uncertainty regarding the legal protection available to publishers, amounts to an invitation to forum

shopping (given that jurisdiction in California exists over essentially any publisher), and will deter much protected speech.

The conflict is also outcome determinative in this case. Thirteen judges have applied the *Bose* "independent examination" standard to the entire record in this case – the district court (Pet. App. 82a), the panel dissent (*id.* 40a), and eleven judges dissenting from the denial of rehearing en banc (*id.* 50a) – and *every one of them* has concluded that CU is entitled to summary judgment. The two members of the panel majority reached the opposite result only because they explicitly adopted a legal standard making it substantially more difficult for a publisher to prevail on summary judgment: they refused to independently evaluate the entire record. *Id.* 16a & n.10.

This case also presents a perfect vehicle to resolve this conflict. This Court has repeatedly recognized its "vitally important" role (*Bose*, 466 U.S. at 503) in elucidating the actual malice standard through the course of "case-by-case adjudication" (*Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 686 (1989)). Here, the district court compiled a fully developed record. The Ninth Circuit produced four detailed opinions advocating different approaches to the case. And the court of appeals completely resolved the question of CU's entitlement to summary judgment on the question of actual malice. Failure to resolve the issue in this posture will mean that the question presented will evade review.

1. The Ninth Circuit's holding conflicts with a coherent and settled line of precedents from the D.C., Second, and Eighth Circuits. Each of those courts acknowledges and discusses this Court's decision in *Anderson* but holds that the *Bose* "independent examination" rule nonetheless applies with full force at the summary judgment stage.[4]

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[4] There is a further disagreement in the circuits over whether the "independent examination" is undertaken from the perspective of the court or instead of a "reasonable jury." For simplicity, petitioner focuses on whether, on summary judgment, the "independent examination" rule applies *vel non*.

The Second Circuit in *Herbert* v. *Lando*, 781 F.2d 298, 308, cert. denied, 476 U.S. 1182 (1986), held that on summary judgment the court must undertake an "independent review of the evidence for actual malice, as required by [the] Supreme Court in *Bose*." Emphasizing the plaintiff's "heavy burden of proof," the Second Circuit in *Lando* held that summary judgment was appropriate despite allegedly inflammatory comments by a writer for the publisher ("I'll get you" and "I'll destroy you"), particularly because (as in this case), another media outlet had deemed the report's conclusions to be accurate. *Id.* at 308-09 & nn.6-7. Citing *Anderson* v. *Liberty Lobby*, the Second Circuit reiterated the applicability of the *Bose* standard in *Contemporary Mission* v. *New York Times Co.*, 842 F.2d 612, 622, cert. denied, 488 U.S. 856 (1988), highlighting the court's obligation to independently review "the whole record" (quoting *Bose*, 466 U.S. at 499). The Second Circuit also recently affirmed the grant of summary judgment in *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 175, cert. denied, 534 U.S. 814 (2001), on the ground that the record as a whole demonstrated that (as in this case) the challenged statement was published with "considerable corroboration" after "extensive research," and the underlying events were "accurately reported." The Second Circuit's standard is also exemplified by a decision of that court involving petitioner. In *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932, 940, cert. denied, 449 U.S. 839 (1980), that court affirmed the granting of summary judgment to petitioner on the basis of "the evidence of actual malice * * * fully marshalled" by the parties. The court of appeals relied heavily on the fact that CU's evidence showed that "the preparation of the article exemplifies the very highest order of responsible journalism." *Id.*[5]

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[5] The correct approach is also typified by another case involving petitioner, *Quantum Electronics Corp.* v. *Consumers Union*, 881 F. Supp. 753, 768 (D.R.I. 1995), in which the court "independently" examined the evidence "submitted by both Quantum and Consumers Union," including "the extensive factual record produced by Consumers Union illustrat[ing] a high level of

In *Liberty Lobby* v. *Dow Jones & Co.*, 838 F.2d 1287, cert. denied, 488 U.S. 825 (1988), and *Liberty Lobby* v. *Rees*, 852 F.2d 595 (1988), cert. denied, 489 U.S. 1010 (1989), the D.C. Circuit explicitly adopted the Second Circuit's *Lando* holding. According to the D.C. Circuit, the *Bose* standard "also applies to decisions of summary judgment." *Rees*, 852 F.2d at 598. That court took care to reject both the rationale and the result subsequently adopted by the Ninth Circuit in this case:

> First Amendment concerns also affect a court's posture in reviewing the evidence presented on summary judgment. Normally, the evidence presented upon a motion for summary judgment is construed in favor of the party opposing the motion. As to nonconstitutional issues in a libel action, this standard still obtains. However, where the constitutional prerequisites of falsity and actual malice are at issue "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the [field] of free expression." While *Bose* and prior cases involved appellate review of trial verdicts in libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment.

Dow Jones & Co., 838 F.2d at 1297.

The Eighth Circuit subsequently adopted the D.C. Circuit's ruling in two separate cases. The Eighth holds that, "[d]espite the posture of the case [*i.e.*, summary judgment], we make an independent judicial evaluation of the evidence." *Price* v. *Viking Penguin*, 881 F.2d 1426, 1434 (1989). See also *Secrist* v. *Harkin*, 874 F.2d 1244, 1251-52 (CA8) (based on a "review of the evidence" in the entire record, court concludes that the

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scientific and journalistic professionalism on the part of all Consumers Union employees involved" in the project at issue. "Against this record," the court concluded, "Quantum's conclusory arguments are entirely inadequate to prove, by clear and convincing evidence, that Consumers Union acted with actual malice." *Id.*

plaintiff had not "met his burden" of proving actual malice), cert. denied, 493 U.S. 933 (1989). In *Price*, the court held that summary judgment was properly awarded, despite a supposed financial motive, because the publisher's "preparation was extensive." 881 F.2d at 1435, 1446.

The Ninth Circuit's passing attempt to distinguish the conflicting federal cases is unconvincing. The panel majority merely cited language in decisions of the D.C., Second, and Eighth Circuits to the effect that the non-movant must "present evidence to support a jury finding that he or she has shown with convincing clarity that a defendant acted with actual malice." Pet. App. 16a n.10 (quoting *Dow Jones & Co.*, 838 F.2d at 1293). But the Ninth Circuit simply ignored those courts' explicit adoption of the *Bose* "independent examination" requirement. Evidence will not "support a jury finding" consistent with the First Amendment in the D.C., Second, and Eighth Circuits unless it survives the "same level of review" as applies to a jury verdict. *Dow Jones & Co.*, 838 F.2d at 1293.

State supreme courts similarly apply the *Bose* independent examination rule with full force on summary judgment. Thus, in *Herbert* v. *Oklahoma Christian Coalition, Inc.*, 992 P.2d 322, 328 (1999), the Oklahoma Supreme Court, "independently [examining] the evidence in the record," rejected the plaintiff's claim that the defendant had misrepresented the plaintiff's voting record with actual malice. The court reasoned that the defendant's evidence established that the author of the publication at issue had "relied on various sources in reaching his conclusions about plaintiff's voting record." *Id.* at 330. Based on this evidence, the court concluded that the evidence presented by the plaintiff was "insufficient to rise to the level of 'actual malice.'" *Id.* at 329.

Similarly, in *Perez* v. *Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 202 (Ohio 1988), the court "exercise[d] its independent judgment in deciding whether the evidence" could support a finding of actual malice with convincing clarity. Citing the defendants' evidence that they "conducted an investigation which produced no indication" that the statements

at issue were unreliable, the court held that no reasonable jury "could find actual malice with convincing clarity." *Id.* at 204.

Only a single court applies anything like the Ninth Circuit's rule that the *Bose* independent examination rule does not apply on summary judgment. The Third Circuit considers the entire record, which the Ninth Circuit pointedly refused to do. But the Third Circuit "discounts" the publisher's evidence and "marshal[s] all the arguments on behalf of the plaintiffs and draw[s] all inferences in their favor." *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1090-91 (1988). That court finds its standard necessary in light of the "limited posture" of the summary judgment stage. *Id.* at 1092.

Because the decision below conflicts with the holdings of several circuits and states' highest courts and is consistent with, at most, a ruling of only one circuit, certiorari should be granted.

2. Certiorari is also warranted because the decision below is erroneous. The Ninth Circuit refused to recognize that "actual malice" is not merely a jury question, but "a question of law" for the court. *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 685 (1989) (discussing *Bose*, *supra*). Although questions that go to the predicate facts underlying the actual malice determination may properly be left for the jury to resolve, the judge has an independent obligation to decide whether the evidence can support a finding of actual malice because there is sufficient evidence in the record as a whole and because the plaintiff's theory, if accepted, would not intrude excessively on First Amendment freedoms. That *legal* question is properly resolved by the judge on a motion for summary judgment.

The Ninth Circuit erred in concluding that it was nonetheless compelled by *Anderson* v. *Liberty Lobby* to reject the application of the *Bose* independent examination standard on summary judgment. To be sure, *Anderson* stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249. But the "independent examination" rule of *Bose* does not call on the judge to "determine the truth" of contested underlying facts. Rather, the court undertakes "an independent

review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505.

In reality, the Ninth Circuit's decision conflicts with *Anderson*, which explained that summary judgment presents "the threshold inquiry of determining whether there is the need for a trial." 477 U.S. at 250. A court properly concludes that no trial is warranted if there is insufficient evidence of actual malice or if imposing liability on the basis of the plaintiff's theory would excessively impinge on free speech. Further, a court cannot determine on summary judgment whether there is "*clear and convincing* evidence" of actual malice without considering the record as a whole. *Anderson* thus instructs the court to consider the "quantum and quality of proof," as well as the "character" and "caliber" of all the evidence, to determine whether the record is "*so one-sided* that one party must prevail as a matter of law" (477 U.S. at 251-52, 254 (emphasis added)), precisely what the Ninth Circuit refused to do.

In this case, for example, the district court and the dissenting judges recognized that all the evidence in the record, considered as a whole, could not establish with convincing clarity that CU had seriously doubted the truth of its speech. CU had submitted voluminous documents supported by affidavits, not simply protestations of innocence. Although a publisher's good faith will not always insulate it from liability, Suzuki's theory in this case turns on a supposed giant conspiracy among CU and its employees, such that (as Suzuki admits (C.A. Br. 9)) "the sole question before this Court concerns CU's state of mind." CU's honestly held concerns about the Samurai were furthermore confirmed by numerous other sources before CU made the 1996 statements now at issue. The Ninth Circuit erred in holding that the overwhelming evidence of CU's good faith and integrity is

irrelevant to "whether there is a need for trial" (*Anderson*, 477 U.S. at 250).[6]

3. The question whether and to what extent the *Bose* independent examination standard applies on summary judgment furthermore merits review in this Court because the decision below will chill core free speech. Summary judgment is a vital procedural mechanism for avoiding the enormous costs of trial in meritless defamation and disparagement cases. Aware that a disgruntled manufacturer can get to trial simply by, for example, "second-guess[ing] experimental design" (Pet. App. 68a (Kozinski, J.)) organizations will be less likely to report product testing "because of doubt whether it can be proved in court or fear of the expense of having to do so" (*New York Times*, 376 U.S. at 279). See, *e.g.*, *Torgerson* v. *Journal/Sentinel Inc.*, 563 N.W.2d 472, 478-79 (Wisc. 1997) ("[S]ummary judgment is an important and favored method for adjudicating public figure defamation actions."); Bruce W. Sanford, *Libel and Privacy* § 13.3, at 653 n.158 (1996-1 Supp.) (similar; collecting cases); see also Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1781-82 (1998) (under the *Bose* standard, "[w]hen pro-plaintiff judgments on the issue

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[6] *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991), is not to the contrary. Petitioner's position is fully consistent with *Masson*'s holding that, "[o]n summary judgment, [the court] must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and the weight to be accorded particular evidence." *Id.* at 520. Nor do the facts of *Masson* assist respondent. *Masson* involved the falsification of direct quotations. This Court held that the publisher could not secure summary judgment on the basis of a reporter's typed notes of tape-recorded conversations with the plaintiff. The Court did *not* hold, however, that only the plaintiff's evidence is relevant on summary judgment. Instead, the Court explained that the plaintiff denied the statements in a sworn affidavit and that the notes conflicted with the tapes themselves. *Id.* Although Suzuki makes much of the fact that there are "tapes" in this case as well, there is no parallel here to the direct evidence of falsification in *Masson*.

of actual malice are appealed and subjected to independent review, over 66% are reversed," such that a system of independent review only after judgment is "inefficient both in terms of cost and time"); Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 711 n.29 (1984) ("Approximately 75% of all motions for summary judgment by defendants on the issue of actual malice are * * * granted.").

The practical consequence of the refusal to apply the *Bose* independent examination rule on summary judgment and to consider CU's undisputed and detailed evidence of the absence of actual malice is that cases will proceed to trial based on speculation. The result will be "show trials" that impose enormous litigation costs that burden valuable speech. Proceeding to trial on the ground that a jury could find actual malice based on the *plaintiff's* evidence is a meaningless exercise when, at the *actual* trial, the jury would be presented with *all* the evidence. Further, in the Ninth Circuit, "review for sufficiency at summary judgment is now governed by one standard," while "review after a jury verdict is governed by another," such that cases "will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*." Pet. App. 53a (Kozinski, J.).

Speech by consumer organizations adverse to well-financed corporate interests is prototypically vulnerable to being deterred by litigation. But the chilling effect of the decision below extends "far beyond consumer organizations to virtually any research group that criticizes corporate interests" (Pet. App. 69a (Kozinski, J.)) and indeed to any media outlet. For the Ninth Circuit's crabbed reading of *Bose* logic applies to speech critical of a political candidate or of the war in Iraq. The effect of the Ninth Circuit's rule is that media defendants may be "crushed by the sheer expense of litigation," the very result that *New York Times*, *Bose Corp.*, and *Anderson* had sought to avoid. See *New York Times*, 376 U.S. at 279 (the fear in defamation suits is that "would-be critics * * * may be deterred from voicing their criticism [by] * * * fear of the expense" of litigation).

Indeed, if CU can be forced to go to trial in this case, it is hard to imagine what publisher would be safe. *Consumer Reports* has won numerous awards for its product ratings and safety testing, and CU is considered among the most independent and scientifically rigorous consumer ratings organizations in the world. Yet, on the Ninth Circuit's interpretation of the First Amendment, CU's detailed and undisputed evidence demonstrating its honesty, objectivity, and impartial testing is *irrelevant* at the summary judgment stage, since the only question for the court is whether the plaintiff could prevail on a "plausible view" of the evidence which it alone presents. Even the most careful and fair-minded publications can be subject to the expense of a full trial, no matter how strong or persuasive their evidence of lack of actual malice, so long as the plaintiff can hypothesize an "avaricious motive" for a decision regarding testing procedures.

That result is untenable in a nation that values free speech. Ratings publications like *Consumer Reports* "perform a valuable function in our consumer society," testing thousands of products to give the purchaser independent and reliable information that she could not gather herself. Pet. App. 68a (Kozinski, J.). As such, CU's reporting typifies the discussion of "public issues" that "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Reviews of dangerous products like the Samurai can be a matter of "life-or-death." Pet. App. 64a (Kozinski, J.).

II. Certiorari Is Warranted To Review The Ninth Circuit's Holding That A Finding Of "Actual Malice" Is Supported By A Disagreement With A Government Agency And By A Publisher's Financial Status.

1. The Ninth Circuit in this case held that CU's "long-running debate" with NHTSA over "how to test rollover propensity most effectively" (Pet. App. 66a (Kozinski, J.)) could be deemed by a jury to constitute purposeful avoidance of the truth and thus could, standing alone, establish clear and convincing evidence of "actual malice" (*id.* 29a (majority)). "Drawing all reasonable inferences in favor of Suzuki," the

majority concluded that a jury could impose liability for CU's supposed failure to "engage in further investigation" in light of NHTSA's criticisms. *Id.*

This extraordinary extension of the "purposeful avoidance" doctrine cannot be reconciled with this Court's ruling in *Harte-Hanks* or with decisions of other courts. *Harte-Hanks* held that a newspaper's failure to make any attempt to interview a key witness supported a jury finding of actual malice. The Court reasoned it was "likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of" the newspaper's statements. 491 U.S. at 692. The *Harte-Hanks* Court concluded that while "failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." *Id.* (citation omitted).

The decision below conflicts with *Harte-Hanks* because, as the majority recognized but deemed irrelevant, CU "challenged the NHTSA report *head on*, stating its disagreement *in detail* and supporting its alternative conclusions *with substantive justifications*." *Id.* (emphases added). See generally App. G, I (CU analysis and published response to NHTSA). Congress itself recognized the merit of CU's position on a related matter in requiring NHTSA to develop a rollover testing program that includes "dynamic" tests. See Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, § 12, 114 Stat. 1800, 1806 (2000). The Ninth Circuit holds that a jury may find actual malice if it concludes at trial that NHTSA was correct in its criticism of CU's tests. But that would establish no more than that the review of the Samurai was in one sense "false," which this Court has said time and again cannot be equated with a finding of "actual malice." *E.g.*, *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

Since *Harte-Hanks*, the lower courts have very sparingly applied the "purposeful avoidance" doctrine to deny summary judgment or uphold a jury verdict – petitioner has found just *four* such reported cases. *Peoples Bank & Trust Co.* v. *Globe Int'l Publ'g, Inc.*, 978 F.2d 1065 (CA8 1992); *Bentley* v. *Bunton*, 94 S.W.3d 561 (Tex. 2002); *Khawar* v. *Globe Int'l, Inc.*, 19 Cal.

4th 254 (1998), cert. denied, 526 U.S. 1114 (1999); *Prozeralik* v. *Capital Cities Communications*, 82 N.Y.2d 466 (1993). In each, as in *Harte-Hanks*, the defendant entirely failed to consult obvious sources that would have alerted it to the falsity of the statements. Mindful of this Court's admonition in *Harte-Hanks* that "failure to investigate will not alone support a finding of actual malice," the lower courts will find actual malice based on purposeful avoidance only when the defendant has refused to take even rudimentary steps to investigate a claim that it has been advised is at least very dubious.

So far as petitioner can determine, no other court has *ever* found "purposeful avoidance" based on a disagreement with a government agency. As Judge Ferguson recognized, if a jury can deem such a disagreement to be actual malice, the government will have "the sole voice in this field" (Pet. App. 45a), in this instance a voice that CU has criticized as being a "reluctant [consumer] watchdog" (*id.* 241). If a public interest organization can be subjected to a libel judgment when it adopts a protocol that differs from the government's and reaches a result a manufacturer dislikes, non-governmental voices will be at a marked disadvantage. As this Court recognized in *New York Times*, this kind of "pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. By making disagreement with the government evidence of actual malice, the Ninth Circuit has endangered "the very center of the constitutionally protected area of free expression" (*id.* at 292), namely the "privilege to speak one's mind * * * on all public institutions" (*Bridges* v. *California*, 314 U.S. 252, 270 (1941)).

But even treating this case as more generally involving a scientific disagreement, rather than a disagreement with the government, the Ninth Circuit's decision conflicts with other circuits' holdings that a departure from established investigative standards does not constitute evidence of actual malice. In *Underwager* v. *Salter*, 22 F.3d 730, 736 (1994), the Seventh Circuit held that the plaintiffs could not establish actual malice by pointing to the defendant's repeated publication of statements

critical of the plaintiffs' conclusions regarding claims of child abuse. The court concluded that "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Id.* Plaintiffs cannot "silence those who hold divergent views" on scientific questions "simply by filing suit and crying 'character assassination!'" *Id.* Similarly, as Judge Kozinski noted (Pet. App. 64a), the Second Circuit will find "purposeful avoidance" only if the publisher engages in an "extreme departure from standard investigative techniques." *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174, cert. denied, 534 U.S. 814 (2001).

2. The Ninth Circuit also accepted Suzuki's argument that CU's alleged financial needs in 1988 supported a finding of actual malice, even with respect to statements made eight years later. Suzuki hypothesized that CU in 1988 concocted a "blockbuster" story to increase the circulation of *Consumer Reports* in order to make money. Pet. App. 22a. This Court held in *Harte-Hanks*, however, that a publisher's "motive in publishing a story," such as "to increase its circulation," "*cannot* provide a sufficient basis for finding actual malice." 491 U.S. at 665 (emphasis added). The Court explained:

> Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. The allegedly defamatory statements [soliciting contributions] at issue in the *New York Times* case were themselves published as part of a paid advertisement. If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.

Id. at 667 (citations omitted).

The majority below erred in asserting that its holding could be reconciled with *Harte-Hanks* on the ground that CU's alleged financial motive "dovetail[ed]" with Suzuki's "test-rigging" theory. Pet. App. 22a. *Harte-Hanks* does not approve layering speculation upon speculation to strip away a speaker's First Amendment liberties. Although *Harte-Hanks* declined to hold that "evidence concerning [financial] motive * * * *never* bears

any relation to the actual malice inquiry" (491 U.S. at 668 (emphases added)), here there is absolutely *no* evidence from which one could reasonably infer that CU lied because of financial considerations. To the contrary, the district court found it undisputed that CU applied the highest ethical standards in its reporting on the Samurai. See *supra* at 6-10.

The court of appeals' holding that "clear and convincing evidence" of actual malice may be inferred in part from a publisher's financial condition presents a direct threat to an array of publishers – including particularly those engaged in public interest activities – given that the entire industry is vulnerable to vexatious litigation. Expeditious use of the summary judgment procedure "can serve a First Amendment purpose in the *New York Times* area," since the costs of litigation are often "as important a source of media self-censorship as the actual damage award itself." Jerome A. Barron & C. Thomas Dienes, *Handbook of Free Speech and Free Press* 352 (1979). See Thomas Littlewood, *Coals of Fire: The Alton Telegraph Libel Case* (1988) (noting that newspaper filed for bankruptcy after $9.2 million libel judgment); C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. Mich. J.L. Reform 1, 13 & n.51 (1989) (noting that "[m]any small publishers are unable to afford libel insurance"); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 Cal. L. Rev. 847, 860 (1986) (arguing that a small publisher will "try to minimize the risk of libel suits" rather than "risk an adverse verdict that could lead to bankruptcy").

Because the Ninth Circuit's holding that a jury may find "actual malice" based on disagreement with the government and a publisher's financial condition conflicts with decisions of this Court and other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 19, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56043

330 F.3d 1127; 2003 U.S. App. LEXIS 9559

February 12, 2002, Argued and Submitted,
Pasadena, California
May 19, 2003, Filed

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION,

Plaintiff-Appellant,

v.

CONSUMERS UNION OF UNITED STATES, INC., a non-profit New York Corporation,

Defendant-Appellee.

* * *

JUDGES: Before: Warren J. Ferguson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Concurrence by Judge Graber; Dissent by Judge Ferguson.

Appendix A

OPINION:

AMENDED OPINION

TASHIMA, Circuit Judge:

In 1988, Appellee Consumers Union of United States, Inc. (CU), published a story in its magazine *Consumer Reports*, in which it rated the Suzuki Samurai "Not Acceptable" based on its propensity to roll over during accident avoidance tests. Since that time, CU has publicly referred to the negative Samurai rating in various fora, most prominently in the 60th Anniversary issue of *Consumer Reports*, published in 1996. Appellant Suzuki Motor Corporation (Suzuki), the manufacturer of the Samurai, has challenged the validity of CU's Samurai test and, on the heels of the 60th Anniversary issue, brought this action against CU alleging product disparagement. CU's motion for summary judgment was granted by the district court, which held that a reasonable jury could not conclude by clear and convincing evidence that CU had acted with actual malice. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand for further proceedings.

I. BACKGROUND

CU is a nonprofit corporation that engages in comparative testing and evaluation of consumer products and services, the results of which are published in the magazine *Consumer Reports*. In order to provide buying and safety advice to automobile purchasers, CU's Automotive Testing Division (ATD) tests approximately 40 cars and other vehicles each year.

Appendix A

CU tested the Samurai in 1988.[1] The Samurai, a sport utility vehicle (SUV) manufactured by Suzuki, was introduced in the United States in 1985. By 1988, approximately 150,000 Samurais had been sold. Although it had received some favorable reviews from the automotive press, the Samurai had also been the subject of news stories that highlighted its instability and propensity to tip over. In February 1988, the Center for Auto Safety filed a petition with the National Highway Traffic Safety Administration (NHTSA) to open an investigation into an alleged safety defect of the Samurai. The petition was denied, although the NHTSA emphasized that the denial was not an endorsement of the safety performance of a vehicle.

A. April 20, 1988: Long-Course Testing

On April 20, 1988, the ATD tested the Samurai, along with the Jeep Cherokee, Isuzu Trooper II, and Jeep Wrangler, on its standard long course, a double lane-change avoidance maneuver test course that CU had used since 1973.[2] The long

1. As Suzuki points out, around this time CU made a significant financial outlay in order to secure a new headquarters building in Yonkers, New York. This outlay of approximately $ 30 million placed CU in what the district court termed a "financially overextended" position.

2. The long-course maneuvers followed preliminary testing on the Samurai. CU notes that during the evaluation and break-in process, Alan Hanks, the Facilities Manager of the ATD, rolled the Samurai on a snow-covered gravel road at 15 miles per hour. During the formal test ride on April 7, 1988, CU driver Kevin Sheehan reported that the Samurai was "by far the worst ride in my 20+ years at CU."

(Cont'd)

course was designed to replicate an emergency situation in which a driver suddenly steers a vehicle left into the opposing lane, to avoid an obstacle, and quickly back into the original lane to avoid oncoming traffic. Several CU personnel were in attendance during the April 20 testing, including Robert Knoll, the head of the ATD, Dr. R. David Pittle, CU's Technical Director and Senior Vice-President, and Irwin Landau, the Editorial Director of *Consumer Reports*, who had been assigned as the initial writer and editor of the Samurai article. Pittle had invited Landau to attend the testing because he thought that they might witness a tip-up of the Samurai.

CU driver Kevin Sheehan drove the Samurai first, putting it through the long course 16 times at speeds reaching over 50 miles per hour. The Samurai that Sheehan drove was equipped with outriggers, which essentially act as training wheels to prevent the car from tipping over completely.[3] During Sheehan's runs, the Samurai did not tip over, prompting Sheehan to make the following evaluation of the car: "rubbery, slow response, rocks a bit, but never felt like it would tip over." In the Avoidance Maneuver Data Summary, Sheehan rated the Samurai as highly as or better than other vehicles tested that day.

(Cont'd)

Sheehan also took the Samurai on a one-day trip test on April 11, 1988, after which he noted that the Samurai should be rated "Not Acceptable." In addition, as Suzuki notes, preliminary research had been conducted for the Samurai story prior to the initiation of long-course testing.

3. Suzuki contends that the outriggers allowed CU to achieve dramatic results during the tests without risking a real rollover.

Appendix A

After Sheehan had completed his testing, CU removed the outriggers. CU driver Rick Small then drove the Samurai through the long course 21 times at speeds similar to those achieved by Sheehan. Again, there were no tip-ups. In his driver log, Small stated: "steering is slow, but it works—responds well and corrects quickly, leans normally, snaps back. Confidence fairly high. No real problem." On the basis of his test drives, Small rated the Samurai higher than the other three vehicles tested that day.

According to testimony by former CU employee Ron Denison, at some point during the long-course testing, which had not demonstrated any tip-ups of the Samurai, Landau told Sheehan: "If you can't find someone to roll this car, I will."

After Sheehan and Small had completed their test runs, Pittle, who was not a test driver, began to drive the Samurai through the long course. According to Pittle, he did so because he had never driven a small SUV and wanted to get a feel for how it handled through the course. Pittle took the car though the course 10 times, achieving a top speed of 49 miles per hour. On Pittle's tenth run, the Samurai tipped up on two wheels. Pittle stated that he did not purposefully cause the Samurai to tip up and that it was a startling and unexpected occurrence. When Pittle tipped the car, one onlooker yelled, "yeah!," while another shouted, "I think I got that, I think I got that."

B. April 26, 1988: Short-Course Testing

After the long-course testing, Knoll redesigned CU's avoidance course to replicate the situation that caused the

Pittle tip-up. This new modified short course had a reduced distance for the first lane change, and the obstacle to be avoided was moved three feet to the left.

Sheehan, who was afraid to drive the Samurai through the short course, was replaced by CU driver Fred Wood. Wood, who drove the vehicle with outriggers, made 15 runs through the course. On the fifteenth run, the Samurai tipped up onto the outriggers. After this last run, Knoll is heard on the test videotape saying: "That's it. That looked pretty good." Knoll later acknowledged that he was "relieved" that the Samurai tipped up during short-course testing.

Small then drove the car through the short course. On his second run, the Samurai tipped up onto the outriggers at a speed of 40 miles per hour. After the tip-up occurred, CU technician Joseph Nappi can be heard on the test videotape saying, "[a]ll right Ricky baby."[4] That same day, CU also put the Jeep Wrangler and Isuzu Trooper II through the short course with no tip-ups reported.

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4. Suzuki emphasizes CU's submission of what it characterizes as a "false" affidavit in connection with Nappi's statement. CU employees Hanks, Sheehan, Wood, Nappi, and Knoll submitted an affidavit stating that it was Denison, not Nappi, who could be heard on the videotape saying "All right, Ricky baby" after Small tipped the Samurai on April 26, 1988. Nappi later admitted, however, that he in fact made the statement. Suzuki suggests that the affidavit was submitted in an effort to discredit Denison, who had testified that Landau threatened to find someone to roll the Samurai after the April 20, 1988, long-course testing. CU proffers a benign explanation for Nappi's changing his story. Resolution of this dispute, however, is not critical to our decision.

C. May 12, 1988: Additional Short-Course Testing

Further testing was scheduled on the short course for May 12, 1988. The parties offer conflicting justifications for why this set of tests was necessary. Suzuki suggests that the additional testing was scheduled for the purpose of shooting video footage of the Samurai for a subsequent press conference, at which it had already been decided that CU would rate the Samurai "Not Acceptable." CU contends that the testing was held to evaluate the performance of the newly released 1988 Samurai, which included suspension modifications that distinguished it from the 1988 version tested previously.

Small was the first to drive the Samurai through the short course on this day, tipping over onto the outriggers on his fifth run. Following Small, Wood tipped the Samurai on his second run. Pittle was watching the test runs and, prior to witnessing a tip up, stated: "Can't you just see it, we get no lift off the ground. Oh God." CU also put a Jeep Wrangler, Jeep Cherokee, and Ford Festiva sedan through the short course on May 12. None of these vehicles tipped up.

D. June 2, 1988: Press Conference

CU held a press conference on June 2, 1988, at which it announced that the Samurai had shown a propensity to roll over in CU's tests and that it would be rated "Not Acceptable" in an article to appear in the July 1988 issue of *Consumer Reports*. During the press conference, Pittle stated that, based on CU's testing, the Samurai had an "unusually high propensity to roll over while performing an accident

avoidance maneuver that could be demanded suddenly of any driver during routine driving." Pittle further described the short course as "benign," involving only "very limited steering inputs," a characterization he later conceded was "not accurate." Pittle also stated that the other tested vehicles had made it through the short course with a "yawn," a statement that Suzuki contends is at odds with the fact that the Isuzu Trooper II failed the course in three out of four runs by hitting cones.[5]

E. July 1988: Article Publication

CU's negative rating of the Samurai was detailed in an article entitled, "Warning: The Suzuki rolls over too easily," published in the July 1988 issue of *Consumer Reports*. The article was initially written by Landau, although drafts were reviewed by Pittle, Knoll, the ATD staff, CU's President Rhoda Karpatkin, CU's Technical Department and Library, and legal counsel.

The article described the steps CU took to test the Samurai, Jeep Wrangler, Isuzu Trooper II, and Jeep Cherokee. It began by recounting the incident in which an ATD staff member rolled the Samurai over on its side during the evaluation and break-in process. After detailing other evidence of the Samurai's safety problems, the article then described the long-course testing, noting that Pittle, "a staff member who does not normally drive the course," tipped the

5. Suzuki also argues that CU deliberately excised footage of the Isuzu Trooper II's runs from the videotape screened at the press conference to downplay the fact that the Trooper also had trouble making it through the course.

Samurai at 45 miles per hour after making "a slight steering misjudgment" that should not have "put daylight under the tires of any car." The article continued by highlighting the results of both short-course tests, concluding that "that *Suzuki Samurai* is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable."

On June 2, 1988, CU submitted to NHTSA a copy of the article, the videotape from the press conference, and a diagram of its short course in support of a petition to establish a minimum stability standard to protect against unreasonable risk of rollover.

F. NHTSA Report

On September 8, 1988, NHTSA issued a decision denying the motor vehicle defect petition filed earlier by the Center for Auto Safety. In its analysis, the NHTSA stated that "the rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles."[6] Denial of Motor Vehicle Defect Petitions, 53 Fed. Reg. 34,866 (Sept. 8, 1988). It concluded that the Ford Bronco II "was found to have more than 3 times the first event rollover . . . involvement as the Samurai" and that "the Samurai had a first event rollover involvement corresponding to the [Chevrolet] S-10 Blazer." *Id.*

NHTSA's opinion also criticized CU's testing protocols, stating as follows: "The existing test procedures for assessing

6. On September 25, 1996, NHTSA denied a second Samurai defect petition on similar grounds. Denial of Motor Vehicle Defect Petition, 61 Fed. Reg. 50,372 (Sept. 25, 1996).

the rollover propensity of vehicles are unsatisfactory because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver and the presumption that the vehicle suspension, tire, and road surface characteristics will remain constant throughout the testing." 53 Fed. Reg. at 34,867. NHTSA concluded by stating that, although the CU testing results were "cause for some concern," "the test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data. Using the same procedures, probably any light utility vehicle could be made to roll over under the right conditions and driver input."[7] *Id.* CU issued a subsequent article in *Consumer Reports* criticizing the NHTSA decision.

G. 1988-1996: CU's Republications of the Samurai Report and Further Rollover Claims

Between 1988 and 1996, CU republished references to the 1988 Samurai rating on at least 24 separate occasions in *Consumer Reports*, CU's annual buying guide, and other editions of CU's car books. During this time, CU states, several events bolstered its belief in the correctness of its "Not Acceptable" rating: a 1988 England-based Consumers' Association article that buttressed the Samurai rollover claim;

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7. In its summary of the test results on multipurpose vehicles, Britain's Department of Transport similarly concluded that the "results from the modified Consumer Union tests were unpredictable" and that "[d]river influence is greatest in the modified Consumer Union manoeuvre." Dep't of Transp., Stability of Multi-Purpose 4-Wheel Drive Vehicles (Dec. 16, 1988).

a 1988 lawsuit filed by seven state Attorneys General charging Suzuki with false and misleading advertising regarding the Samurai's rollover potential (the case settled); the decision in *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 375 (S.D. Ga. 1991), in which the court suggested that Suzuki knew of the Samurai's rollover propensity and did nothing to correct it; two separate multimillion dollar verdicts in the case of *Rodriguez v. Suzuki Motor Co.*, where juries determined that the Samurai was unreasonably dangerous due to its rollover propensity (both verdicts were reversed and the case settled); the disclosure of documents from the *Malautea* and *Rodriguez* cases suggesting that Suzuki knew of the Samurai's rollover propensity; and eight years of further SUV testing by CU during which time only the Samurai in 1988 and Isuzu Trooper in 1996 tipped up.

H. January 1996: 60th Anniversary Issue of Consumer Reports

In its 60th Anniversary issue of *Consumer Reports*, published in January 1996, CU set forth a chronology that contained a picture of the Samurai tilted on two wheels, with the following caption:

> 1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to

> power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable.

The same January 1996 issue also contained a section entitled "Memo to Members," in which CU's President stated that "we still find products that are unsafe: From kerosene heaters to the *Suzuki Samurai* to child safety seats, CONSUMER REPORTS has called them out—and our work goes on."[8]

I. April 1996: Suzuki Files This Action

On April 11, 1996, Suzuki filed the instant action alleging that CU's ongoing publication of the negative Samurai rating constituted product disparagement.[9] After discovery, CU moved for summary judgment, challenging the sufficiency of Suzuki's evidence that CU had acted with actual malice in its reporting on the Samurai. The district court granted CU's motion and entered judgment in its favor. Suzuki timely appealed.

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8. In November 1995, CU published a car buyers guide on CD-Rom that also reiterated the "Not Acceptable" rating from its July 1988 *Consumer Reports* article.

9. After the action was filed, CU continued publicly to refer to the Samurai test, citing the "Not Acceptable" rating in a June 1996 *Consumer Reports* article on SUVs; sending out contribution solicitation cards in August and October 1996 with a photograph showing the Samurai tipped up on two wheels; and referring to the Samurai in a 1996 press conference and article about the Isuzu Trooper.

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). This court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). We must therefore determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Devereaux*, 263 F.3d at 1074.

Because this case implicates the First Amendment protections of a media defendant in the context of product disparagement, "[t]he appropriate summary judgment question is whether a reasonable jury could find, by clear and convincing evidence, that [the plaintiff] has shown actual malice." *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998). In answering this question, we "must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991). "[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in [its] favor. If [the plaintiff] does so, there is a genuine issue of fact that requires a trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The dissent contends that, by applying the well-established summary judgment rules to the actual malice issue

on summary judgment, we offend the "independent examination" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). This argument, however, conflates the summary judgment standard of review with application of the *New York Times* standard and, as a result, impermissibly weighs the evidence at the summary judgment stage. Under the independent examination rule, we "exercise our independent judgment" in evaluating the lower court's opinion, rather than granting it any deference. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). In other words, we review the district court's decision de novo. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) ("We review the district court's finding of actual malice de novo."); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) ("First Amendment questions of 'constitutional fact' compel us to conduct a *de novo* review." (internal quotation marks and brackets omitted) (quoting *Bose*, 466 U.S. at 508 n.27)). This does not mean, however, contrary to the dissent's suggestion, that in the process of exercising our independent judgment, we jettison the procedural rules governing summary judgment when reviewing the grant of summary judgment in First Amendment cases. While it is true that we must independently examine the record when reviewing the grant of summary judgment, starting with *Anderson v. Liberty Lobby*, the Court has been clear that we apply the well-established summary judgment rules to review of the actual malice issue:

> Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the

> trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Anderson, 477 U.S. at 255-56. *See also Masson*, 501 U.S. at 520 ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence."). And, as we have noted above, our case law also recognizes the application of the normal summary judgment standards to the actual malice issue. *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082, 1087 (9th Cir.), *cert. denied*, 154 L. Ed. 2d 443, 123 S. Ct. 557 (2002); *Kaelin*, 162 F.3d at 1039. Thus, contrary to the dissent's suggestion, the independent examination rule of *New York Times* is consistent with our well-established procedural rules governing review of summary judgment motions on the actual malice issue and does not require us to discard the procedural rules designed to preclude the resolution of disputed factual issues at the summary judgment stage.[10]

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10. The cases cited by the dissent do not require otherwise. *See Andersen v. McCotter*, 100 F.3d 723, 725 (10th Cir. 1996) (Cont'd)

Thus, although the dissent provides a plausible view of the evidence—that CU acted in good faith as a skeptical consumer watchdog should—it is not our role, at this stage, to take sides in this way. As we discuss below, there is also another plausible view of the summary judgment record—that CU "rigged" a test to achieve a predetermined result in order to serve its own pecuniary interests. Because a jury would be entitled to believe the latter view of the evidence, Suzuki's case survives summary judgment, even applying the independent examination standard.

(Cont'd)
(affirming that "[s]ummary judgment is appropriate when there is no genuine issue as to any material fact"); *Secrist v. Harkin*, 874 F.2d 1244, 1251 (8th Cir. 1989) ("To withstand a motion for summary judgment, a public official or public figure must present evidence to support a jury finding that he or she has shown with convincing clarity that a defendant acted with actual malice."); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 838 F.2d 1287, 1293 (D.C. Cir. 1988) ("The question for the court is 'whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.'" (quoting *Anderson*, 477 U.S. at 257)); *Herbert v. Lando*, 781 F.2d 298, 305 (2d Cir. 1986) (affirming summary judgment standards).

Similarly, CU also misstates the applicable standard of review, contending that the normal summary judgment standard does not apply. The cases on which it relies, however, all involve the review of a judgment rendered after trial. *See Bose*, 466 U.S. at 510-11; *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 669 (9th Cir. 1991); *Eastwood*, 123 F.3d at 1252. Thus, these cases do not, as CU suggests, require that we abandon the established standard of review in the summary judgment context.

III. ANALYSIS

The parties do not dispute that for Suzuki to recover in this case, it must, as a public-figure plaintiff, prove by *clear and convincing evidence* that CU published disparaging statements about the Samurai with *actual malice*.[11] *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (stating that claims for product disparagement "are subject to the same first amendment requirements that govern actions for defamation"); *see also Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 66 F. Supp. 2d 1117, 1124 (C.D. Cal. 1999); *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 78 Cal.Rptr.2d 627, 637 (Ct. App. 1998); *cf. Bose*, 466 U.S. at 513 (assuming without deciding that proof of actual malice is required in a product disparagement action brought by a public-figure plaintiff against a media defendant). Actual malice requires a showing that the defendant made a false statement "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988);

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11. Suzuki accepts the actual malice formulation of the product disparagement standard for the purposes of this appeal, although it suggests that the Supreme Court has left this issue open, *see Bose*, 466 U.S. at 513, and reserves the right to challenge the standard on further review. *Amicus* Washington Legal Foundation devotes a substantial portion of its brief to arguing that the First Amendment does not demand a showing of actual malice for product disparagement claims. We decline, however, to address an issue raised only by an *amicus*. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998) ("Generally, we will not consider on appeal an issue raised only by an amicus.").

accord Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989).

This Court has interpreted *Harte-Hanks* as providing two different tests for proving reckless disregard. *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 900 (9th Cir. 1992) (*Masson II*):

> Where the jury has proof that a publisher "actually had a high degree of awareness of probable falsity," that alone will establish that it "in fact entertained serious doubts as to the truth of [its] publication." Where such direct proof is missing, the jury may nevertheless infer that the publisher was aware of the falsity if it finds that there were "obvious reasons to doubt" the accuracy of the story, and that the defendant did not act reasonably in dispelling those doubts . . . . As *Harte-Hanks* points out, "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."

Id. (quoting *Harte-Hanks*, 491 U.S. at 688, 692) (brackets in the original).

Suzuki argues that the district court erred in concluding that a reasonable jury could not find that CU's statements regarding the Samurai met the actual malice standard. It contends that the evidence is sufficient to sustain a jury verdict under either test articulated in *Masson II* for proving CU's reckless disregard of the truth.

Appendix A

A. Awareness of Probable Falsity

Suzuki first contends that a reasonable jury could find by clear and convincing evidence that CU had a high degree of awareness of the probable falsity of its statements about the Samurai. It argues that there is a sufficient evidentiary basis showing that CU knew that the Samurai did not tip up more easily than other SUVs and essentially rigged its testing to produce a predetermined result.

At the outset, CU raises a general challenge to Suzuki's argument, suggesting that the overwhelming weight of the evidence demonstrates the skill and dedication of CU in researching and publishing the Samurai story, and therefore militates against any finding of actual malice. CU assails Suzuki for taking "a few facts out of context, which it pieces together in a contrived and inherently implausible fashion without any supporting evidence." It argues that this court should reject Suzuki's arguments as conjectural and places great weight on its own assertions that it absolutely believed in the truth of its statements.

In the summary judgment context, this argument is unconvincing. It is true that CU has offered evidence of its accuracy in reporting the Samurai story—or, at least, in its subjective belief that it accurately reported the story. But its characterization of its own evidence as overwhelming and its disparagement of Suzuki's evidence as out of context begs the question that we must resolve. The fact that CU employees believed in the truth of their negative statements about the Samurai cannot, by itself, defeat summary judgment. *See St. Amant v. Thompson*, 390 U.S. 727, 732, 20 L. Ed. 2d

262, 88 S. Ct. 1323 (1968) ("The defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true."); *Solano*, 292 F.3d at 1087 ("we have yet to see a defendant who admits entertaining serious doubt about the authenticity of an article it published"). Rather, the issue is whether there is adequate evidence to support the contrary view—namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, that is not a question to be resolved here. *See Anderson*, 477 U.S. at 249.

Turning to the evidentiary basis for Suzuki's claims, Suzuki contends that there is sufficient evidence that CU "rigged" the tests to produce the rollover result, demonstrating its awareness of the probable falsity of the negative Samurai rating. In support of this argument, Suzuki highlights the testimony of Denison, who stated that Landau, after witnessing Sheehan and Small's clean runs through the long course, said: "If you can't find someone to roll this car, I will." After this comment was allegedly made (and after Sheehan and Small had taken the Samurai through 37 long-course runs without incident), Suzuki notes that Pittle, who was not a CU test driver, decided to drive the Samurai, tipping the vehicle after 10 runs to a cheer from a CU onlooker.[12] Suzuki also points to the fact that CU modified the long

12. The record does not indicate whether 10 runs was predetermined by the testing protocol or whether Pittle simply stopped making further runs after achieving a tip-up.

course, which it had used since 1973, to replicate the Pittle situation and then resumed its testing of the Samurai until it tipped up—again eliciting statements that can be construed as expressions of satisfaction ("That's it. That looked pretty good." "All right Ricky baby.").

This evidence is adequate to preclude summary judgment. A reasonable jury could find by clear and convincing evidence that CU sought to produce a predetermined result in the Samurai test. The timing of the course modification, the fact that the Suzuki was tested repeatedly until it tipped, and the reactions of CU employees all support such an inference. A permissible inference of reckless disregard follows from this evidence of "rigged" testing—if CU modified the course in order to cause a rollover, a reasonable jury could find that the truthfulness of any subsequent reports was vitiated.

Although it suggests that the facts have been taken out of context, CU does not seriously challenge Suzuki's argument of rigging. CU does question Suzuki's reliance on the Denison testimony, arguing that he had a high regard for CU's ethical standards and did not believe that anyone involved in CU's testing of the Samurai rigged the results. Denison did testify, however, that while he believed CU was honest 99.9 percent of the time, the 0.1 percent that he was excluding was the 1988 test of the Samurai. Moreover, although CU has its own interpretation of why it modified the long course and retested the Samurai, we, of course, cannot credit that interpretation over Suzuki's at the summary judgment stage. The district court did not give adequate credit to this evidence of test-rigging.

Suzuki also contends that evidence of CU's avaricious motives supports an inference of actual malice. It suggests that the evidence reveals that CU was financially overextended due to capital investments in the period leading up to the Samurai report and needed a blockbuster story to raise CU's profile and increase fundraising revenues. It is not disputed that, at the time of the Samurai story, CU had incurred substantial debt for a new headquarters and that CU has used the Samurai story in its fundraising solicitations.

CU characterizes Suzuki's financial motive argument as an "unsupported accusation" and states that, instead of increasing revenues, CU's pre-publication press conference about the Samurai test actually decreased its sales of *Consumer Reports*. CU further contends that evidence of financial motive does not support a finding of actual malice under the relevant case law. *See Harte-Hanks*, 491 U.S. at 667 ("Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice."). The district court adopted this argument in granting summary judgment.

We agree with Suzuki, however, that the district court erred in this regard. There is sufficient circumstantial evidence of a financial motive to support the ultimate conclusion of actual malice. While CU is correct that financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry. *See Harte-Hanks*, 491 U.S. at 668; *Kaelin*, 162 F.3d at 1042. The evidence of financial motive dovetails with the evidence of test-rigging described above. The fact that CU needed to boost its revenues to complete its capital campaign

lends credence to Suzuki's contention that CU rigged the Samurai testing to produce the predetermined rollover result.

We conclude that the evidence of motive and test-rigging, in combination, is sufficient to preclude summary judgment and therefore requires reversal.[13]

B. Purposeful Avoidance

Suzuki also argues that there was sufficient evidence for a jury to have concluded under *Masson II* that, in the face of obvious reasons to doubt the accuracy of its Samurai story, CU did not act reasonably in dispelling those doubts, thereby raising the inference that CU knew of the story's falsity. Under this approach, "[i]t is not . . . the failure to act reasonably in itself that establishes malice; that failure is only a link in the chain of inferences that could (but need not) lead a jury to conclude that the publisher failed to conduct an investigation because it was already pretty much aware

13. Suzuki also advances a number of additional arguments in support of its contention that the summary judgment record is sufficient to show that CU acted with a high degree of awareness of the probable falsity of its report on the Samurai. Specifically, Suzuki contends that a jury could draw the inference that CU acted with actual malice based on the factual inaccuracies in the Samurai story; CU's premeditation in publicizing false statements about the Samurai; and CU's concealment of evidence contrary to its claim that the Samurai "rolls over too easily." Because the analysis set forth above is dispositive of the first prong of the *Harte-Hanks* test ("a high degree of awareness of probable falsity"), we need not reach Suzuki's remaining arguments in support of reversal based on *Harte-Hanks*' first prong.

of the falsity." *Masson II*, 960 F.2d at 900. The central inquiry is whether the evidence discloses that a defendant purposefully avoided the truth. *Id.*

First, Suzuki claims that CU had reason to doubt its assertion that the Samurai's rollover propensity warranted a "Not Acceptable" rating. In particular, Suzuki points to the NHTSA decision issued in September 1988 indicating that the Ford Bronco II had a three times greater rollover record than the Samurai, which had a rollover record corresponding to the Chevrolet S-10 Blazer. Additionally, CU learned in 1989 that the Samurai's rollover rate was less than the rollover rate of the Nissan Pathfinder, Toyota 4 Runner, Jeep CJ-7, and Ford Bronco II. Further, in 1992, the Insurance Institute for Highway Safety produced a report showing that the Samurai had a rollover rate lower than that of many other SUVs.

Second, Suzuki contends that CU had sufficient reasons to doubt the validity of the testing procedures it used to determine the negative Samurai rating. Here Suzuki again relies on the NHTSA study criticizing CU's testing procedures for failing to provide a basis for repeatable results and being overly dependent on driver influence. Suzuki also emphasizes the British Department of Transport study echoing these conclusions, as well as statements by Knoll and Sheehan suggesting that at least some CU personnel acknowledged that its testing procedures were overly driver-influenced. Suzuki asserts that, despite these indications that the Samurai rating rested on questionable data and suspect methodological premises, CU took no steps to engage in further investigation, thereby reinforcing the inference of

purposeful avoidance. Suzuki faults CU for failing to incorporate instruments into its testing that would record how the driver was steering the vehicle and for never evaluating its test results against real-world crash data. It suggests that CU's failure to do so violated accepted journalistic standards[14] and raises the inference that CU ignored contrary evidence that would confirm the falsity of its claims about the Samurai. The district court rejected much of this evidence, stating particularly that the NHTSA study was not entitled to greater weight than any other study or opinion regarding testing methods and therefore could not support a claim of actual malice.

In response to the NHTSA report, CU published an article in the November 1988 issue of *Consumer Reports* that addressed the NHTSA's critique of CU's negative Samurai rating. With respect to the issue of the Samurai's rollover rate, CU stated:

> According to NHTSA's own Crash Avoidance Research Data file, however, the *Suzuki Samurai*'s rate of rollover in single-vehicle accidents is more

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14. Relying on expert witness testimony, Suzuki asserts that CU violated accepted journalistic standards in failing to engage in further investigation of contradictory evidence. CU responds that the expert testimony is irrelevant because it is not probative of CU's subjective state of mind. *See, e.g., Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994). Although expert testimony regarding CU's departure from accepted professional standards is not sufficient by itself to establish actual malice, *see Harte-Hanks*, 491 U.S. at 669, it does shed light on the propriety of CU's response to contrary rollover evidence and, thus, is entitled to be given appropriate weight.

than double the average for all sport-utility vehicles. In 1986, the most recent year for which there are figures, the *Suzuki* rolled over in 64 percent of all single-vehicle *Suzuki* accidents reported in this data base. The only vehicle that came close to the *Samurai* in rollover involvement is the now-discontinued *Jeep CJ-5* (49 percent). By contrast, the rollover rate for full-sized sedans was only 8 percent.

NHTSA appears to have relied not on its statistics on rollover rates for single-vehicle accidents but on a different data base, one that includes only rollovers involving a *fatality*. Elsewhere, . . . [the NHTSA] notes that the *Samurai* was involved in six fatal rollovers per 100,000 vehicles on the road, a record the agency compares favorably with that of the *Ford Bronco II*—19 fatal rollovers per 100,000 vehicles on the road.

CU has learned that the overall rollover rate for the *Bronco II* is high—about the same as that for the *Jeep CJ-5*—but not nearly as high as the *Suzuki*'s. The higher number of *fatalities* in *Bronco II* rollovers could come about for a number of reasons. The *Suzuki* rolled over at a relatively low speed in our accident-avoidance tests; if *Bronco II* rollovers occurred at higher speeds, one would expect more fatalities per rollover. One would also expect more fatalities if the *Bronco II* were driven more miles, on average, than the *Suzuki*.

Appendix A

Regarding the NHTSA's criticisms of CU's testing protocols, the article went on to state:

> NHTSA did no independent testing of the *Suzuki*'s rollover propensity. Rather, it uncritically accepted Suzuki's data, saying Suzuki "demonstrated that the Samurai satisfactorily completed industry accepted . . . tests which might be used to assess a vehicle's rollover propensity."
>
> But there are no industry-accepted tests for rollover propensity—a point NHTSA itself makes elsewhere in its letter . . . .
>
> [One] test performed for Suzuki looks superficially like an avoidance maneuver, since the car was run through a slalom course. But in a realistic avoidance maneuver, a car is steered first to the left and then back to the right immediately. In the Suzuki test, the car was steered to the left, then straightened and allowed to recover before returning to the right lane. That is a simple lane-changing maneuver, not an accident-avoidance maneuver.
>
> NHTSA also adopted as its own another of Suzuki's arguments: Using the accident-avoidance maneuver developed by CU, the agency stated, "probably any light utility vehicle could be made to roll over." But NHTSA offered no evidence or independent test results to support such

> speculation. In fact, no vehicle other than the *Suzuki* has rolled over in the 10 years we've tested for accident avoidance.

The critical inquiry under *Masson II* is whether CU failed to act reasonably in investigating and responding to contrary studies in a manner that suggested it was attempting purposefully to avoid discovering the truth of the matter. In general, the analysis conducted and published by CU in response to the NHTSA study is not indicative of purposeful avoidance. To the contrary, in the November 1988 article, CU challenged the NHTSA report head on, stating its disagreement in detail and supporting its alternative conclusions with substantive justifications. To the extent that there were contrary rollover statistics, CU analyzed them and explained why they did not warrant a conclusion at odds with its initial assessment of the Samurai. In response to the NHTSA's critique of CU's testing, CU argued that the Suzuki tests upon which the NHTSA relied were flawed. While Suzuki may disagree with CU's discussion of the rollover statistics or its criticisms of Suzuki's own accident avoidance tests, such disagreement does not demonstrate CU's purposeful avoidance of critical facts.

While we agree with CU, however, that much of Suzuki's purposeful-avoidance argument boils down to its disapproval of CU's conclusions, there is one issue that nevertheless precludes summary judgment here. In particular, CU has done nothing to respond to the criticism of its testing procedures as overly influenced by driver input. This evidence formed the basis for the district court's decision in *Isuzu Motors*, in which the court relied heavily on the NHTSA report to deny

CU's summary judgment motion, stating that "CU was aware that its tests were significantly reliant upon driver input and skill." *Isuzu Motors*, 66 F. Supp. 2d at 1125. Suzuki has pointed to further evidence that some CU personnel shared this assessment. The issue is whether CU, armed with the knowledge that its tests were potentially flawed in this way, failed reasonably to investigate in such a manner that could lead a jury to conclude by clear and convincing evidence that CU was aware of the falsity of its Samurai report. Drawing all reasonable inferences in favor of Suzuki on this point, CU's failure to address this deficiency with its testing procedure could lead a jury to conclude that it was aware that doing so would disclose the falsity of its negative Samurai rating.

Therefore, we conclude that Suzuki has also raised a genuine issue of material fact as to whether CU purposefully avoided information that would have undermined its assessment of the Samurai's rollover propensity.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is reversed and the case remanded for further proceedings.[15]

REVERSED and REMANDED.

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15. We, of course, intimate no view of the ultimate outcome on the merits.

CONCUR BY: Susan P. Graber (In Part)

CONCUR: GRABER, J., concurring in part:

I agree with the majority opinion's theoretical discussion but agree only in part with its application of our standard of review.

A. *Standard of Review*

The majority opinion employs the proper standard of review. Although the independent examination rule applies at the summary judgment stage, it does not require us to abandon all the usual summary judgment procedures. Instead, we are required to examine independently the entire record in determining whether the nonmoving party has presented evidence sufficient to allow a reasonable jury to conclude, by clear and convincing evidence, that a public figure has proven actual malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998).

At the summary judgment stage, the independent examination rule does not allow us to end our analysis by noting that there is "some" or "any" evidence in the record giving rise to a genuine issue of material fact, as we would be permitted to do in a run-of-the-mill civil action. The First Amendment requires us to graft the more demanding "clear and convincing" standard onto our traditional summary judgment analysis and requires us to consider independently whether the non-moving party has presented sufficient

evidence to satisfy this demanding standard. But we still are required to view the evidence in the light most favorable to the nonmoving party, and we are prohibited from deciding questions such as credibility, which remain reserved exclusively for the factfinder. *Anderson*, 477 U.S. at 255.

The dissent points out that the "clearly erroneous" standard of Rule 52(a) does not apply to some findings of fact made after a full trial in a First Amendment case. 292 F.3d at 1085 (Ferguson, J., dissenting) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)). Rather, in First Amendment cases, reviewing courts undertake an independent examination of the record to determine whether the judgment constitutes "a forbidden intrusion on the field of free expression." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). The dissent argues incorrectly that we ignore this directive in our application of the summary judgment standard.

The dissent's interpretation of the independent examination rule would require us to abandon a fundamental tenet of summary judgment procedure, namely, viewing the evidence in the light most favorable to the nonmoving party. None of the cases cited by the dissent requires us to take this drastic step. In fact, the Supreme Court's post-*Bose* decisions clearly illustrate that, whatever the independent examination rule means in the summary judgment context, it does not mean that we must abandon our practice of viewing the evidence in the light most favorable to the nonmoving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to

be drawn in his favor."); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991) ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence."); *see also Kaelin*, 162 F.3d at 1039, 1041 (holding that the court "must draw all justifiable inferences in favor of [the nonmoving party], including questions of credibility and of the weight to be accorded particular evidence," and that the court is required to "[v]iew[] the facts in the light most favorable to [the nonmoving party]" (internal quotation marks omitted)). Thus, it is clear that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

There are good reasons why courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial. The evidence presented at trial often differs markedly from that which is offered in a party's summary judgment papers. The propositions claimed in affidavits may or may not be proved at trial. Some witnesses turn out to be credible; some do not.[1] Some inferences that seemed tenuous

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1. In this case, the credibility of a number of CU's employees is of paramount importance to the "actual malice" inquiry. Further, were the jury at trial to disbelieve those employees' explanations of statements made during the testing process, this court could not question the jury's finding. *See Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (noting that the independent

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at summary judgment appear quite reasonable in light of the evidence at trial. Even in the First Amendment context, therefore, summary judgment cannot serve as a complete substitute for trials on the merits in all cases. As the Supreme Court stated in *Anderson*:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. *It by no means authorizes trial on affidavits.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. at 255 (emphasis added). Accordingly, when reviewing a summary judgment ruling on the question of actual malice, we must apply the independent examination

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examination rule "does not mean we give jury findings no weight; on questions of credibility, which the jury is uniquely qualified to answer, we defer."); *see also Bose*, 466 U.S. at 498, 499-500 (noting that the independent examination rule is consistent with Federal Rule of Civil Procedure 52(a)'s mandate that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'"). Accordingly, viewing the evidence in the light most favorable to the nonmoving party at summary judgment is particularly important in cases such as this one, where the jury could choose to disbelieve the testimony of the moving party's witnesses.

rule differently than we would if we were reviewing an actual-malice finding made after a full trial.

B. *Actionable Statements*

I must part company with the majority opinion, however, on the question of which statements are actionable. There are dozens of allegedly actionable statements in this case. Both the majority and the dissent analyze these statements as a whole, using an all-or-nothing approach. I believe that each statement must be considered separately against the standard outlined above.

Under this analysis,[2] only two of the statements withstand CU's motion for summary judgment.

1. The first of these appeared in an August 20, 1996, CU Background Paper: "In 1988, we developed the "short course" *because we discovered* that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." (Emphasis added.) The evidence detailed in the majority opinion is sufficient to allow a rational jury to find, by clear and convincing evidence, that CU developed the short course *before* discovering a rollover "propensity" and *in order to create* a rollover propensity, not *because of* it.

2. The second potentially actionable statement appeared in CU's January 1996 anniversary issue: "1986 CU buys its

2. Suzuki's claims are untimely with respect to many statements. Others fail to meet the exacting summary judgment standard used in a First Amendment case.

own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS *discovers that the Suzuki Samurai easily rolls over in turns* and rates it Not Acceptable." (Emphasis added.) The evidence in the summary judgment record would allow a reasonable jury to find by clear and convincing evidence that what CU discovered was that the Suzuki Samurai did *not* roll over "easily" in turns, but had to be coaxed.

For the reasons explained here and in the majority's opinion, Suzuki has presented sufficient evidence to allow a reasonable jury to conclude, by clear and convincing evidence, that CU made those two statements with actual malice. Summary judgment with respect to those statements was inappropriate.

DISSENT BY: Warren J. Ferguson

DISSENT: FERGUSON, Circuit Judge, dissenting:

I respectfully dissent. By failing to apply the full procedural protections afforded by the First Amendment, the majority and concurrence intrude on the field of free expression in two of its most important contexts: consumer protection and public safety.

In *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), the Supreme Court held that specific constitutional protections of speech limit the state's power to award damages in libel actions brought by public officials. *Id.* at 283. One method of protecting speech is the actual malice standard, which is set forth by the majority opinion. Majority Op. at 6498-99; *see also New York Times*, 376 U.S. at 285-86. Another method is the independent examination rule, which requires an appellate court to independently review the whole record, "so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (citation omitted). In adopting the actual malice standard and independent examination rule, the Supreme Court noted the importance of protecting "the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 270. The Court also recognized that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space they need [] to survive." *Id.* at 271-72 (internal quotation marks and citation omitted).

The majority and concurrence undermine these procedural protections by erring in their application of both the actual malice standard and the independent examination rule.

1. Independent Examination

The majority and concurrence misunderstand the argument of Consumers Union of United States, Inc. ("Consumers Union") that we must conduct an independent examination of the record under *New York Times*. Majority Op. at 6495 & n.10. While purportedly applying the "independent examination rule," both the majority and concurrence fail to grasp how the *additional* procedural protection of the independent examination functions and, thus, are unable to apply the rule properly in this case. Moreover, both Judge Tashima and Judge Graber overlook the ongoing debate among courts and legal scholars regarding the applicability of the "independent examination" rule to appeals from summary judgment motions, commentary which clarifies the significance of the independent examination rule in our analysis at the summary judgment stage.[1] Because the majority and concurrence have demonstrated a limited understanding of the independent examination rule, I provide a brief overview below.

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1. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2432, 2442-45 (1998); Scott Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 289-97 (1987); Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U.L. Rev. 3, 50-91 (1985). The debate among the circuits is discussed further below.

Appendix A

From the outset, it is worth noting that prior to our decision in *Crane v. Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992), it was an open question within our circuit whether the independent examination rule applied to appeals from summary judgment. Even after *Crane*, the Supreme Court has recognized that the scope of procedural protections in First Amendment cases remains unclear. *Waters v. Churchill*, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (recognizing that, although "some procedural requirements are mandated by the First Amendment, and some are not[,]" the Court has not "discovered a general principle to determine where the line is to be drawn.").

However, the application of the independent review rule to a summary judgment determination is the most logical method to address the concerns regarding the chilling of speech expressed in *New York Times*. *See* 376 U.S. at 278 ("Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."). As a practical matter, the threat and actual cost of litigation, including attorneys fees, inhibit speech. *See id.* at 278-79; *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980) ("The cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations."). At times, the costs of a successful defense can be the same or greater than what the damage awards would have been. *See* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U. L. Rev. 3, 38 (1985). Moreover, the defense costs *prior* to trial can be extraordinarily high. *See id.* at 91.

Because of these costs and their effects on speech, the procedural protection of the independent examination rule is necessary not only for appellate review of post-trial decisions, but also for appellate review of summary judgment decisions.[2] The independent examination rule provides an additional level of protection of the media's First Amendment rights. Moreover, it addresses concerns regarding the chilling effects on speech of successive, costly litigation. *See Steaks Unlimited, Inc.*, 623 F.2d at 280 ("Regardless whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster [the goals of] the First Amendment . . . .").

Unfortunately, *Crane* notwithstanding, the applicability of the independent review rule to appeals from summary judgment remains uncertain within our circuit. *See, e.g., Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998) (failing to discuss the applicability of the independent review rule). While in the instant case the majority and concurrence grudgingly concede that the independent examination rule applies, this concession is

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2. In her partial concurrence, Judge Graber contends that "[t]here are good reasons why courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial." Concurrence at 6510. However, Judge Graber's analysis fails to consider the purpose and intent of a summary judgment motion, particularly in a First Amendment case. In First Amendment cases, we must be aware of the dangers associated with the cost of litigation which can stifle expression, particularly by those whose interests are in warning of danger to the public safety.

empty. Their analysis differs in no meaningful respect from an ordinary summary judgment appeal, thereby stripping the independent examination rule of its intended purpose and meaning. I would find that a correct application of the independent examination rule to the facts before us reveals that the plaintiff's case must fail on summary judgment. There is simply insufficient evidence in the record as a whole that could support a reasonable jury finding that the plaintiff has shown actual malice on the part of Consumers Union by clear and convincing evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

2. Applying the Procedural Protections Mandated by *New York Times*

The majority and concurrence incorrectly apply the actual malice standard and undermine the importance of independent review. By doing so, Judges Tashima and Graber permit a forbidden and dangerous intrusion on the field of free speech.

Both Judges Tashima and Graber fail to contextualize Consumers Union's testing of the Samurai within the purpose and mission of the organization. The District Court recognized the importance of doing so when it stated: "The trier of fact could not be expected to disregard the nature of defendant's business—testing and reporting on consumer products—nor would plaintiff so urge, and it would be error for a court to so instruct. Thus, it is clear that, based on the information CU had gathered, it was concerned about the safety of the Suzuki Samurai." Viewed in this context, the

actions and words of Consumers Union were appropriate. Consumers Union began its investigation of a product with the assumption that it could or might be unsafe. Once the product had performed in a manner that could be deemed unsafe, Consumers Union tested it more rigorously. Although the events that occurred in this case suggest that Consumers Union's representatives had the intractable, "bulldog" mentality of a consumer advocacy organization, the facts do not evince actual malice as required by the law.

Judge Graber parts with the majority when she concludes that only two of Consumers Union's statements are potentially actionable. With respect to the first statement,[3] Judge Graber notes that "[t]he evidence detailed in the majority opinion is sufficient to allow a rational jury to find, by clear and convincing evidence, that CU developed the short course *before* discovering a rollover 'propensity' and *in order to* create a rollover propensity, not *because of* it." *Id.* at 6512. Because Judge Graber does not specify the evidence she believes supports a finding of actual malice with respect to this statement, and because Judge Tashima does not analyze Suzuki's claims sentence by sentence, I can only infer that Judge Graber is referring to the fact that Consumers Union altered the course, as well as the comments made by Consumers Union employees during the testing. This evidence is insufficient to support a finding of actual malice, let alone by clear and convincing evidence. At most,

3. The first statement by Consumers Union that Judge Graber finds potentially actionable is: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." Concurrence at 6512.

the comments of Consumers Union's employees give rise to an inference of bias against the Samurai.[4] Bias alone, however, cannot support a finding of actual malice. *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995).

Moreover, the fact that Consumers Union altered the course cannot supply the "something more" that is required by the exacting actual malice standard. Not only is it undisputed that Consumers Union disclosed the alteration in the article, it is also undisputed that the Samurai tipped over prior to Consumers Union developing the short course. Consumers Union's proffered reasons for developing the short course are completely consistent with the benign explanation that they were simply seeking confirmation of the existing accusations of rollover propensity against the Samurai, which it had exhibited in the early stages of testing.[5]

This is not a case in which Consumers Union contrived to make the Samurai roll over. Suzuki admits that there had been four independent lawsuits in which the vehicle rolled over, including one lawsuit by the Attorneys General of seven states. Certainly, when choosing to republish references to the rating, numerous rollover instances such as these reaffirmed Consumers Union's opinion that the vehicle was

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4. The statements identified by Judge Tashima are as follows: (1) "If you can't find someone to roll this car, I will." (2) "That's it. That looked pretty good." (3) "All right Ricky baby." Majority Op. at 6501.

5. It is undisputed that the Samurai tipped during the break-in period, as well on the long course when it was driven by an inexperienced driver.

"Not Acceptable." In short, the undisputed evidence reveals no evidence of actual malice with respect to the first statement that Judge Graber finds potentially actionable.

The second statement that Judge Graber identifies as potentially actionable is as follows: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS *discovers that the Suzuki Samurai easily rolls over in turns* and rates it Not Acceptable." Concurrence at 6512. Judge Graber states that "[t]he evidence in the summary judgment record would allow a reasonable jury to find by clear and convincing evidence that what CU discovered was that the Suzuki Samurai did *not* roll over 'easily' in turns, but had to be coaxed." *Id.* Because Consumers Union disclosed the basis of the statement, the word "easily" was merely a properly made characterization of the Samurai's performance during the testing. *See Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) ("Thus, we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."). Moreover, even if reasonable minds differ about whether the Samurai tipping over four times on an altered course constitutes "easy" rollover propensity, this is evidence only of a subjective word choice, not of actual malice as the First Amendment requires.

Judges Tashima and Graber also misconstrue my argument, contending that I apply the independent

examination rule in a manner that swallows the summary judgment standard, and thus engage in a forbidden intrusion on the province of the fact finder. Majority Op. at 6595-97; Concurrence at 6509-10. Their accusations reveal their lack of understanding of the way the rule interacts with the summary judgment standard, and the analysis that the rule requires that we apply in First Amendment cases. Were we to apply both standards correctly, we would determine whether there is a genuine issue of material fact as to actual malice under the summary judgment standard. However, in doing so, we would conduct an independent review of the entire record "to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505; *see also Secrist*, 874 F.2d at 1251 (stating that a court must "make [its] own independent review of the record to ensure the principles of actual malice are constitutionally applied."). Because the independent examination rule allows us to view all of the evidence, and not just that which favors the plaintiff, we give maximum protection to the First Amendment. Far from discarding traditional summary judgment rules, my analysis is consistent with the way the independent examination rule has been applied at the summary judgment stage by other circuits. *See, e.g.*, *Secrist*, 874 F.2d at 1251; *Herbert*, 781 F.2d at 305, 308. Like in *Secrist* and *Herbert*, upon an independent review, the evidence of actual malice in the case before us is paltry and unable to survive a summary judgment motion.

On a broader level, the majority's decision has troubling implications. If taken to its logical end, the majority's reasoning will allow *any* deficiency in a consumer group's test to become the grounds for litigation. This will inhibit the speech of organizations and individuals who would fear voicing their findings and views because of the threat of litigation. *See New York Times*, 376 U.S. at 278-79. Suppression of such speech will create less informed consumers and hinder public safety and health. *See Steaks Unlimited, Inc.*, 623 F.2d at 280 (discussing the importance of First Amendment protection for consumer reporting). Moreover, it will give the government the sole voice in this field. In cases, such as this, where the consumer organization disagrees with the government agency's findings or where the agency criticizes the organization's findings, companies will be able to use this fact as proof that the organization was acting with actual malice.[6]

The law is certain that in order to hold Consumers Union is not protected by the First Amendment, there must be clear and convincing evidence that it acted with actual malice toward Suzuki. The appropriate standard on summary judgment in First Amendment cases is not simply whether there are disputed issues of material fact; the test is whether or not a reasonable jury could find by clear and convincing evidence that Suzuki proved actual malice on the part of

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6. This concern is most likely part of the reason that the District Court stated that the NHTSA study was not entitled to greater weight than any other study or opinion regarding testing methods. The majority, however, chooses to give the NHTSA study greater weight and, thus, discourages the non-governmental voices in the fields of consumer protection and vehicle safety. Majority Op. at 6507.

Consumers Union. Here, no reasonable jury could find clear and convincing evidence of actual malice. *See Kaelin*, 162 F.3d at 1039. After an independent review of the record, it is unquestionable that the District Court constitutionally applied the principles of actual malice. The grant of summary judgment was necessary both to avoid the inhibition of free speech by the media and to protect public safety and health. For these reasons, I would affirm the District Court's decision.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 19, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56043

330 F.3d 1110; 2003 U.S. App. LEXIS 9565; 2003 Cal. Daily Op. Service 4131; 2003 Daily Journal DAR 5336

May 19, 2003, Filed

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION, Plaintiff-Appellant, v. CONSUMERS UNION OF UNITED STATES, INC., a non-profit New York Corporation,

Defendant-Appellee.

* * *

JUDGES: Before: Warren J. Ferguson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. KOZINSKI, Circuit Judge, with whom PREGERSON, REINHARDT, T.G. NELSON, HAWKINS, THOMAS, McKEOWN, WARDLAW, W. FLETCHER, FISHER and BERZON, Circuit Judges, join, dissenting from denial of rehearing.

Appendix B

OPINION:

ORDER

The opinion and dissenting opinion, filed June 25, 2002, slip op. at 9009, 292 F.3d 1192, are withdrawn and replaced by the amended opinion, concurring opinion, and dissenting opinion filed concurrently with this order. With these amendments, the panel has voted to deny the petition for rehearing en banc, with Judge Ferguson recommending that the petition be granted.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing.*

The petition for rehearing en banc is denied.

DISSENT:

KOZINSKI, Circuit Judge, with whom PREGERSON, REINHARDT, T.G. NELSON, HAWKINS, THOMAS, McKEOWN, WARDLAW, W. FLETCHER, FISHER and BERZON, Circuit Judges, join, dissenting from denial of rehearing en banc:

For over half a century, Consumers Union has been testing and rating consumer products and publishing the

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* Judge Rawlinson was recused.

results in its magazine, Consumer Reports. A significant portion of the American public relies on CU's ratings on a regular basis, and almost everyone consults Consumer Reports now and then before making a significant purchase—whether a sound system, a dishwasher or a car. What makes CU's ratings particularly useful is the thorough explanation of the testing procedures employed, which lets consumers judge whether the ratings fairly represent the product.

The Suzuki Samurai article, the subject of this lawsuit, is no exception. Running some 6500 words, it tells readers precisely how CU came to conclude that "The Suzuki rolls over too easily," starting with an incident during the vehicle's break-in period where the Samurai "flopped over on its side" during a low-speed maneuver. The explanation is not written for morons; like other CU reviews, it is geared to an intelligent, informed consumer. Yet the careful reader will not fail to understand the central facts that undergird Suzuki's claim in this lawsuit, namely, that the Samurai did well on CU's standard course, that CU then modified the course to make it more challenging and, as a result, the Samurai did far worse than its competitors.

I find it incomprehensible that a review truthfully disclosing all this information could be deemed malicious under *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). If CU can be forced to go to trial after this thorough and candid disclosure of its methods, this is the death of consumer ratings: It will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury. The ultimate losers will be American consumers denied

access to independent information about the safety and usefulness of products they buy with their hard-earned dollars. The majority sets a dangerous precedent, and the full court errs grievously by failing to take the case en banc to correct the error.

1. The majority's analysis is tainted throughout by its failure to articulate, much less apply, a coherent theory of the "independent examination" rule, a key element of the *New York Times* regime. When a public figure sues his critics for defamation, we "must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285 (citation omitted). This rule "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). It is "a rule of federal constitutional law" that "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

We have heretofore sensibly assumed that the independent examination rule calls for us to do something more than we would normally do. After all, it hardly "preserve[s] the precious liberties established and ordained by the Constitution" to treat a First Amendment case the same as a slip-and-fall. When we review a jury verdict under *New York Times*, we don't "independently examine" the record merely by considering all the evidence—we already

do that in every case anyway. *See Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) ("[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record."). Nor do we merely review de novo the trial judge's determination whether a jury question exists—again, we already do that in every case. *See Janes* v. *Wal-Mart Stores Inc.*, 279 F.3d 883, 886 (9th Cir. 2002) ("We review a district court's denial of a motion for judgment as a matter of law *de novo* . . . ."). First Amendment independent examination is an *additional* protection that the Constitution affords publishers.

Where there are genuine evidentiary disputes over particular factual predicates of actual malice—such as questions about a witness's credibility—the issue is for the jury. The judge does not weigh the evidence to find those historical facts, but instead makes a routine sufficiency determination. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). After resolving the predicate factual disputes in the plaintiff's favor, however, the judge must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." *Bose*, 466 U.S. at 514; *see Eastwood* v. *Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997).[1] And *that* process is not a routine sufficiency determination,

1. Independent examination is, of course, a one-way street: If the jury *rejects* a plaintiff's claim, a judge may not invoke the rule to resurrect it.

because it *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.

The majority ignores these principles and instead treats the rule as nothing more than de novo review of the trial judge's sufficiency ruling. On this theory, independent examination is exactly what we do whenever we consider a trial judge's determination that a case does not present a triable issue. Of course, de novo review in this sense actually hurts CU because the district court sided with it below.

The majority relies on *Bose* and *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001), for the point that independent examination means the same thing as de novo review. But those cases involved a very different use of the term: not de novo review of the lower court's sufficiency-of-the-evidence determination, but de novo review of the underlying question whether the defendant acted with actual malice. The former type of review is what we do in every case where a party appeals a grant of summary judgment or a denial of judgment as a matter of law. It's the latter type—weighing the evidence on the ultimate question of actual malice—that constitutes independent examination.[2]

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2. The majority's confusion may stem from the fact that *Bose* and *Hoffman* were appeals from bench trials. Where the district court is the fact-finder, de novo review of its opinion is also de novo review in the *New York Times* sense because it's effectively de novo review of the underlying question of actual malice. But where the district court merely makes a sufficiency determination—whether on summary judgment or post-verdict—de novo review of its opinion is *not* de novo review in the *New York Times* sense. We always review sufficiency determinations de novo; independent examination means doing something more.

Appendix B

The majority seems willing to concede that independent examination has some bite after the verdict. But it refuses to "conflate[]" this post-verdict standard with the summary judgment one. Am. op. at 6495. By decoupling the two standards, the majority conflicts directly with Supreme Court precedent. As the Court explained in *Anderson*, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." 477 U.S. at 249. Because the court must ultimately review a plaintiff's verdict under the independent examination rule, it necessarily follows that it must apply that same standard at summary judgment.

The practical effect of the panel's decision is that our review for sufficiency at summary judgment is now governed by one standard, while our review after a jury verdict is governed by another. Cases will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*. What possible purpose is served by conducting such mock trials? Are they held just in case new evidence materializes mid-way through trial? Or merely to give the lawyers trial experience? I know of no other context where we allow a plaintiff to get to trial with a factual record that will not support a verdict in his favor.[3]

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3. Judge Graber is of course correct that "[t]he evidence presented at trial often differs markedly from that which is offered in a party's summary judgment papers." Concurrence at 6510. That a plaintiff defeats a summary judgment motion doesn't guarantee that the evidence at trial will support a verdict in his favor. What's novel about the majority's approach is that it reverses the rule: It lets a plaintiff defeat summary judgment with a record inadequate to support a verdict, on the mere speculation that some evidence at trial—as yet unknown—will materialize to support his case.

The omnipresent danger in defamation suits is that "would-be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279. That a plaintiff's suit ultimately fails after trial is little solace to a defendant crushed by the sheer expense of litigation. For example, in this suit and a similar one filed by Isuzu, *see Isuzu Motors Ltd.* v. *Consumers Union of U.S., Inc.*, 66 F. Supp. 2d 1117 (C.D. Cal. 1999), Consumers Union had by September 1999 reportedly spent more than $10 million defending its ratings, while its two adversaries had spent more than $25 million. *See* John O'Dell, *Bruising Tests Await Consumer Reports in Court*, L.A. Times, Sept. 19, 1999, at A1. And these are just two of the many lawsuits CU has had to contend with—about a dozen published cases (and who knows how many unpublished ones) involving disgruntled CU reviewees seeking revenge through the courts. Good for lawyers, but not so good for free expression.

It's no answer to let the chips fall and assume that insurance will cover the tab. Insurance makes costs more predictable, but it doesn't decrease the amount publishers must pay to do business in the long term. If publishers present a greater liability risk, insurers will charge higher rates. The burden on free speech is no less intolerable.

Even when First Amendment values do not hang in the balance, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are

designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed. R. Civ. P. 1). That principle is all the more vital where a slow and expensive determination will result in self-censorship.

Where a plaintiff's evidence is strong enough to support a verdict, the publisher must stand trial. But there is no sensible reason to impose such onerous costs on a publisher where the plaintiff is doomed to fail. Allowing a plaintiff to get to trial on a record that will not support a verdict under *New York Times* does not make sense, and if some of the Court's precedents can be read to suggest this result, the Court would do us all a great favor by explaining that it intended no such absurdity.

2. Had the majority applied the constitutionally required standard, it could not have reached the result it did.[4] Suzuki's case is easily summarized. Its first theory is that CU knew it was probably lying because its employees tried to make the Samurai tip and were happy when they succeeded. The second is that CU purposely avoided the truth by failing to address a potential source of experimental error. Neither of these theories withstands serious scrutiny.

As to the first, the majority relies heavily on the fact that CU switched to the short course after the long course failed to cause any tips. The initial problem with this theory

4. I use the term "majority" loosely because Judge Graber never tells us which parts of Judge Tashima's opinion she relies on to find actual malice.

is that CU fully disclosed this in its article. Just so we're clear what we're talking about, here's what CU told the public:

> Our regular test program includes a maneuver designed to see how controllable a car remains when a driver is forced to steer sharply—to avoid, say, a child who unexpectedly darted into the road. To simulate that kind of sudden emergency, our drivers run each car through a lane-changing course marked off by traffic cones. The drivers begin their left turn out of the lane 60 feet before the obstacle. They then must steer sharply enough to get back into the lane no more than 60 feet beyond the obstacle.
>
> . . . .
>
> Under the experienced touch of our drivers, all four utility vehicles got through the course at 52 mph or better. The *Suzuki Samurai* was actually more maneuverable than the others, since it's so much smaller and lighter.
>
> With concern about a potential rollover somewhat allayed, a staff member who does not normally drive the course tried to steer the *Suzuki* around the obstacle. All went well for several runs at moderate speed. Then, on a run at 45 mph, the driver made a slight steering misjudgment: He turned wider than necessary to clear the obstacle, something many ordinary drivers might

do in an emergency turn. That forced him to turn back a bit more sharply than our regular testers had. As he turned the steering wheel to the right to get back into lane, the *Suzuki* teetered to the left. The two right-side tires lifted about a foot off the pavement before the driver was able to bring the vehicle back under control.

. . . .

Would the other utility vehicles show similar instability if steered the way the *Suzuki* had been steered?

To find out, we put all the vehicles through a slightly different maneuver. We realigned the cones so that our test drivers had to start the turn 50 feet from the obstacle instead of 60 feet from it. That meant they needed to steer around the obstacle and back into lane in a total of 110 feet rather than the usual 120 feet. We also moved the obstacle three feet farther to the left.

. . . .

In this more demanding test, the *Isuzu Trooper*, the *Jeep Wrangler*, and the *Jeep Cherokee* began knocking over cones at about 40 mph. But they remained stable. We also tried the *Jeep Wrangler* without the outriggers. Still stable.

Appendix B

> The *Suzuki Samurai*, by contrast, toppled onto the outriggers when turned through the course at about 40 mph. Without the outriggers, it would have rolled over.
>
> During the period we were testing these vehicles, Suzuki introduced a modified version of the *Samurai*, a "1988 1/2" model with a softened suspension. We acquired the latest version and ran it through the same accident-avoidance maneuver. It proved even less stable than the *Samurai* we originally tested. The front right wheel lifted in turns at low speed. And the vehicle rolled onto the outriggers at 38 mph.[5]

CU thus thoroughly explained both its track design and its testing procedure. It acknowledged that the Samurai did well on the standard course and alerted the reader that CU designed a new course specifically to force a maneuver it had reason to believe the Samurai would fail. Even assuming CU wanted to make the Samurai tip and designed its short course to achieve that result, so what? The fact remains that the Samurai *did* tip—several times—while every other vehicle run through the same course did not tip even once. This is certainly something consumers would want to know before deciding which of these vehicles to put their families in.

By exposing CU to liability for basing its negative opinion of the Samurai on a fully disclosed testing procedure,

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5. The introductory explanation to the article is reprinted in full in the appendix.

the majority runs head-first into a settled First Amendment principle: "'Where a publication sets forth the facts underlying its statement of opinion . . . and those facts are true, the Constitution protects that opinion from liability for defamation.'" *Standing Comm.* v. *Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (quoting *Lewis* v. *Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983)); *see also Partington* v. *Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) ("[W]hen a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."). The logic behind the rule is straightforward and unassailable: When a publisher prints an opinion but doesn't state the basis for it, the reader may infer a factual basis that doesn't exist. *See Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20-21, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990). But when a publisher accurately discloses the facts on which he bases his opinion, the reader can gauge for himself whether the factual basis adequately supports the opinion.

This is not a case where a defendant fabricates results and then purports to rely on them—like when NBC secretly strapped rockets to GM trucks with side-mounted fuel tanks to make them explode in collisions. *See* Jane Hall, *Chief of NBC News Quits in Wake of Rigged Crash*, L.A. Times, Mar. 3, 1993, at A1. There's not a shred of evidence that the short course was clandestinely altered to make it more forgiving when the other vehicles went through, or that CU's drivers intentionally soft-pedaled the runs with the other vehicles to make the Samurai look worse by comparison. The majority's gripe here is not with CU's reporting of its tests, but with its experimental design, and that is entirely the wrong focus. If CU had found the Samurai "Not Acceptable" based on

tests performed with a Ouija board, most consumers would dismiss its rating as worthless. But, so long as CU disclosed its method, the report would be protected by the First Amendment.

Even aside from the fact that CU fully disclosed its change in course, there is simply nothing improper about what it did. When CU first tested the Samurai on the long course, it didn't tip—a result consistent with the theory that it is safe, but also consistent with the theory that the long course is not challenging enough to detect the Samurai's design flaw. CU did what any conscientious researcher would do and redesigned its experiment to focus on the conditions that seemed more likely to detect a flaw. *See, e.g.*, Karl R. Popper, *The Logic of Scientific Discovery* 45 (Hutchinson rev. ed. 1968) (1934) (noting that a scientist, after first detecting a condition, "might try to rearrange his experiments so as to make the effect reproducible"). It then ran the Samurai and several other vehicles through the course and found that the Samurai had a dramatically higher propensity to roll over—it tipped on several occasions while no other vehicle tipped once.

The opinion makes much of the fact that CU had used its long course for testing since 1973, but cites no evidence it was using the course for *rollover* testing during that time. In fact, the evidence in the record suggests the contrary: None of the 500 vehicles CU had previously tested had rolled over, and it did not even use safety outriggers to protect its drivers from rollovers until the tests in question. Clearly, CU had not previously focused on this particular risk, no doubt because the original test course was designed before SUVs

and similar vehicles with high centers of gravity had come into vogue. But after news stories and a NHTSA filing highlighted the Samurai's rollover propensity, after the vehicle rolled over once during break-in, and after it tipped *again* following formal testing on the long course, CU had good reason to change focus. Adjusting test procedures to better detect a risk arising from new consumer preferences is hardly reprehensible. It is precisely what one would expect from researchers seriously interested in consumer safety.

Consider an analogy: Assume CU has been testing clothes dryers using a standard load since 1973. It learns that a particular brand of dryer occasionally causes fires. CU dries several standard loads but experiences no adverse results, so it tries a few loads with more flammable materials—say, acetate bed-linens. This is not part of its existing testing protocol, but the materials are ones that consumers have begun to use more often in recent years. If the materials catch fire in the one dryer but not the others, is CU's test a fraud because it changed its procedure to focus on the new risk?

The relevant question in either case is not whether the new procedure is different from the old, but whether it accurately reflects conditions consumers might occasionally face. And the majority points to no evidence at all on *that* score. The short course was not some extraordinary challenge that no consumer vehicle could be expected to pass—after all, every other tested vehicle did pass it. CU's previous use of the long course has no bearing on whether its short course results were fraudulent.

Appendix B

By equating CU's switch to a short course with knowledge of probable falsity, the majority ignores the realities of experimental design. Scientific inquiry would grind to a halt if researchers couldn't tinker with their methods as they learned new information about the object of their study. CU's switch is not even bad science, let alone bad journalism, and certainly not journalism so awful that it loses First Amendment protection. To be probative of actual malice, evidence must have at least some tendency to exclude obvious innocuous explanations for the defendant's conduct. CU's switch from a long course to a short course does not.[6]

That leaves the majority with no direct evidence that CU's methods were flawed, and only four contemporaneous statements of CU employees—"If you can't find someone to roll this car, I will," an unspecified cheer, "That's it. That looked pretty good," and "All right Ricky baby"—that, to the majority, show an unfair bias against the Samurai. If CU had a negative view of the Samurai going into the tests, the reasons are not hard to imagine—the Samurai had already been slammed in the press for its rollover propensity, had been the target of a safety complaint filed with NHTSA and had rolled over on its side while a CU employee drove it at only 15 mph. But even if CU's preconception were entirely

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6. The majority also relies on the fact that the driver who made the Samurai tip the first time was not one of CU's regulars. This fact was also disclosed in CU's article, *see* p. 6466 *supra*, and, in any case, it's hard to see why it matters. Presumably, consumers driving the Samurai are typically not accredited test drivers either. Moreover, it's undisputed that the actual short course test runs, in which the Samurai tipped several times and the other vehicles didn't tip once, were all performed by CU test drivers.

arbitrary, these fleeting remarks—three of which are no more than inane schadenfreude—would still be insufficient to support a finding of actual malice.

Actual malice is not bias. "[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 281, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974) (internal quotation marks omitted). Speech that is "malicious" only in the sense that the speaker is biased against his target is fully protected; the First Amendment extends beyond "reasoned [and] evenhanded" commentary to the "slashing and one-sided." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 54, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).

Bias may *support* a showing of actual malice; if you bad-mouth someone, the fact that you also don't like him makes it marginally more likely you're lying. But bias evidence is not sufficient by itself to support a claim: "[A]ctual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 666 n.7, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) (internal quotation marks omitted); *see also, e.g.*, *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174 (2d Cir. 2001); *Shoen* v. *Shoen*, 48 F.3d 412, 417 (9th Cir. 1995). If a tabloid sends an investigator to dig up dirt on a celebrity, the fact that it deliberately attempts to find damaging information and is pleased when it succeeds hardly proves it's lying. Forcing CU to stand trial for statements that show nothing more than bias ignores these settled First Amendment principles.

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We don't hold participants in public debate to Article III standards of impartiality. Nor do we second-guess their investigations as if we were reviewing administrative action under the APA. So long as they don't lie or recklessly disregard the truth, they can be as unfair and one-sided as they want. The majority's clear and convincing evidence that CU strayed beyond this wide field is shockingly thin. The Second Circuit requires a plaintiff to show that bias was coupled with "an *extreme* departure from *standard* investigative techniques." *Behar*, 238 F.3d at 174 (emphasis added). For the majority, *any* departure from *past* technique will apparently suffice, even one entirely consistent with standard experimental methodology.

What ultimately dooms Suzuki's case is that, no matter *what* CU's motives for choosing the short course, it is undisputed that the Samurai tipped multiple times on that course while the other vehicles tested didn't tip even once. If the majority has its way, evidence like this—which may make a life-or-death difference to consumers—will be suppressed for fear of precisely this type of lawsuit, waged with gale-force intensity by corporate plaintiffs with bottomless litigation budgets.

3. The majority's second ground for reversal is weaker still. After CU published its initial report, NHTSA criticized certain aspects of its methodology. CU responded, and the majority finds its response for the most part satisfactory. It concludes, though, that CU fell short by failing to address NHTSA's critique of its reliance on driver input.

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The majority's analysis suffers from familiar flaws. Even if CU's reliance on human drivers made its tests less reliable, it *disclosed* the relevant facts in its report. CU explained in detail its use of human test drivers and the precise maneuvers they performed—right down to the distance between traffic cones. *See* pp. 6466-67 *supra*. Surely these disclosures provide adequate information for readers to make a reasonable assessment of CU's testing. At the very least, they provide readers familiar with safety testing mechanics—such as NHTSA and Suzuki engineers—the information they need to assess CU's testing and come up with a public response. CU should not stand trial over a potential source of experimental error that it fully disclosed.

The majority's holding is flawed for deeper reasons as well. It faults CU for failing to "investigate" and "address" a perceived deficiency in its testing procedure. Am. op. at 6508. But what was CU supposed to do? Using human drivers obviously introduces a potential source of experimental error. But it also replicates actual driving conditions and thus captures nuances that might be missed if the experiment were performed by entirely mechanical means. If CU had built some stationary rollover machine instead, Suzuki would have complained that its failure to recreate actual driving conditions made its results unreliable. If CU had built a car-driving robot, Suzuki would have complained that the test didn't reflect the reactions of a *human* driver. All experiments have potential sources of error, and many reputable experiments rely on human input. That an experiment can be criticized on these grounds doesn't make it reckless to rely on the results, even if the criticisms have some validity.

Failure to explain away or eliminate all potential sources of error in an experiment cannot be a basis for liability.

What the majority calls "actual malice" is really just one side of a long-running debate over how to test rollover propensity most effectively. CU favors "dynamic" tests using actual drivers, while NHTSA has long preferred "static" tests based on measurements of a vehicle's geometry. While the majority thinks NHTSA has the better of this scientific debate, Congress was not so sure: In 2000, it passed a statute *requiring* NHTSA to develop a dynamic rollover testing program. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, § 12, 114 Stat. 1800, 1806 (2000) (codified at 49 U.S.C. § 30117(c)); *see* Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance, 66 Fed. Reg. 35,179, 35,180-81 (request for comments July 3, 2001) (explaining the statute's history). The TREAD Act followed on the heels of CU's criticism that NHTSA's static testing methods, although a "useful predictor of tripped rollover, . . . should be used in conjunction with a dynamic stability test using vehicle maneuvers to better predict the risk of untripped rollovers." 66 Fed. Reg. at 35,180-81. And as NHTSA concedes, the Act "reflects CU's concern." *Id.* at 35,181.

As if that weren't vindication enough, when NHTSA acted on Congress's directive, one of the dynamic rollover tests it initially proposed using was the "CU double lane change," *id.* at 35,183, the very test the majority now finds so heretical that reliance on it amounts to actual malice. NHTSA identified both the advantages of CU's test

("face validity"; "probably a good representation of what the public expects of a personal vehicle"; "better represents the dynamics that may result in an untripped rollover"; "maximum speed through the maneuver can be used as part of the vehicle score"; "display[s] the operation of electronic stability control systems") and its disadvantages ("any vehicle will pass such a test if equipped with tires of sufficiently low traction"; "driving style can strongly influence the test results"; "course layout may cause the steering reversal and roll momentum effect to be more critical for some vehicles than for others"; "a course tuned to one vehicle may not be the worst case for another vehicle to which it is compared"). Although NHTSA ultimately opted for a different set of dynamic rollover tests, those it selected still relied on human drivers and merely involved a lower number of steering inputs (one or two, as opposed to four in CU's test). *See* Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance (Part II), 67 Fed. Reg. 62,528, 62,537-38 (proposed Oct. 7, 2002). NHTSA thus reduced, but did not eliminate, this potential source of error.

Surely these legislative and regulatory developments bear heavily on the disputed issues in the case. Strangely, however, the majority does not even mention them. That Congress specifically repudiated NHTSA's exclusive preference for static rollover testing shows we cannot blindly accept NHTSA's criticism of dynamic testing as evidence of actual malice. That NHTSA thought CU's test was an option worth considering twelve years later shows that it is not so off-the-scientific-map that reliance on it is tantamount to purposeful avoidance of the truth. That NHTSA ultimately chose tests that involve the same source of error, just to a lesser degree,

shows that the issue is not nearly so black-and-white as the majority paints it. On a more fundamental level, these developments show that courts have no business wading into this scientific feud over the best way to test rollover propensity. Which method gives the optimal mix of advantages and disadvantages is a point of disagreement among Congress, NHTSA, CU and others. It should be resolved by scientists, policymakers and consumers, not crushing libel verdicts.

The appropriate response to a poorly designed experiment is to conduct a better one and then convince people that your method is more accurate—not to sue the other guy into silence. The point is poignantly made by the facts of this case. For all its kvetching, NHTSA apparently never even performed its own tests on the Samurai—it relied entirely on data from Suzuki. *See* Am. op. at 6506. Suzuki's test procedures no doubt had plenty of defects of their own (the most obvious being "company conducting test has financial stake in outcome"). Can we really say the world is better off if the only source of Samurai rollover data is the manufacturer? If consumers are purchasing an SUV they will trust with their lives, aren't they entitled to know that the Samurai tipped repeatedly in human-driven tests while the other SUVs didn't tip once?

Groups like CU perform a valuable function in our consumer society, but they suffer from a constant threat of litigation. It's easy for a jury to second-guess experimental design, and every suit carries the prospect of a massive damages award because the very purpose of a negative review is to convince the reader that the plaintiff's product is not

worth buying. It's hardly surprising, then, that CU attracts lawsuits like moths to a lantern. *See, e.g.*, *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (truly silly dispute over whether sound from plaintiff's speakers wandered "about the room" rather than merely "along the wall" litigated all the way to the Supreme Court). If Suzuki can get to trial on evidence this flimsy, no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.

The majority's decision reaches far beyond consumer organizations to virtually any research group that criticizes corporate interests. Many public interest groups are thinly funded, and their experiments are necessarily full of imperfections. Their targets can now stuff unflattering results into a scientific oubliette just by pointing out sources of experimental error and then threatening to sue if the groups don't "investigate" and "address" them. Today it's Consumers Union panning the Samurai; tomorrow it could be Greenpeace claiming that some oil refinery is killing fish. The First Amendment doesn't allow companies to squelch their scientific detractors on evidence as thin as Suzuki's. The majority's legal regime cannot coexist with our tradition of robust scientific debate on matters of public concern.

4. Judge Graber focuses on two particular statements, but succeeds only in highlighting how deficient Suzuki's case is. She first faults CU for reporting that it developed the short course "because [it] discovered" the Samurai's rollover propensity, when in fact it developed it "in order to create" that propensity. Concurrence at 6512 (emphasis omitted).

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I don't understand how CU could have "create[d]" the Samurai's rollover propensity. A propensity is something innate to the object. Is Judge Graber suggesting that CU somehow modified the vehicle to make it more likely to tip? There is no evidence of that whatsoever. What CU did was put the Samurai through a test that *demonstrated* its innate tendency to tip, a propensity it had as a result of the way it was built. CU designed a course to develop evidence of the vehicle's propensity to roll over. It could not and did not create the propensity itself.

That problem aside, there is simply nothing false about CU's statement. There's no dispute *why* CU built the short course: As it thoroughly explained in its article, it was trying to replicate the conditions that caused the Samurai to tip when a CU employee turned too sharply on the long course. Suzuki doesn't dispute this. CU switched to the short course "because [it] discovered" a propensity to roll over during that particular maneuver, a maneuver none of the drivers had previously performed because they had all driven the long course as designed. CU's statement is an entirely accurate description of its reason for developing the short course.[7]

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7. Even if Judge Graber were right and CU somehow misled the public about its reasons for building the short course, I can't see how it could possibly matter. Whether CU built the short course for the reasons it gave or because little green men from Mars told it to do so, the fact remains that it built the course and the Samurai flunked it while every other vehicle passed. CU's motives simply are not germane to Suzuki's theory of recovery because they do not in any way defame the Samurai or contribute to any damage it may have suffered. It's as if CU claimed it conducted the tests on a Wednesday when it actually conducted them on a Friday.

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Judge Graber also complains that CU said the Samurai rolls over "easily" when, in fact, it had to be "coaxed." Concurrence at 6512. She apparently fears that readers might assume the Samurai rolled over with no "coaxing" at all. But no one could be so misled. Even tremendously unsafe vehicles roll over only in extreme maneuvers. No one reading that the Samurai rolls over "easily" would infer it routinely flops over with no human intervention.

Saying a consumer vehicle rolls over "easily" is like saying a particular NBA player is "terrible." The adjective is inherently relative because the reference group is already extreme. A "terrible" professional athlete is one who's terrible relative to his peers, not relative to the population at large or a class of third-graders. Likewise, the mental image conjured up when one hears the Samurai rolls over "easily" is not of some oopsy-daisy clown car, but a vehicle that rolls over easily *relative to other vehicles in its class*. And, since all vehicles require *some* coaxing to roll over, Judge Graber's fear—that readers might be duped into thinking they'll come out of the supermarket to find that their Samurai had flopped itself over in the middle of the parking lot—is a specter of her own creation. Even ignoring the rollover during break-in and the tip on the long course—not to mention the NHTSA complaint and the media coverage—CU was plainly justified in concluding that, given the alternatives, the Samurai's rollover propensity was more than what safety-conscious consumers should be willing to bear. And that's exactly what any reader would understand it to have said.

Moreover, the word "easily" cannot be plucked out of context. It must be read in light of CU's article (to which the

anniversary issue obviously referred). CU explained exactly how "easily" the Samurai tipped over, and what CU did to reach its conclusion. It did not secretly put lead weights in the roof to raise the center of gravity; it did not use narrow tires to cause instability; it did not jimmy the suspension. It did exactly what it said it did—it put the Samurai through the same course as the other vehicles, and the Samurai tipped while the others did not. CU did not ask consumers to accept its claim at face value; it gave them the data on which it based its conclusion so they could decide for themselves whether or not the Samurai tipped over too easily.

Even if CU's reporting were somehow inaccurate or misleading, there are any number of legal doctrines that protect it. ("Rhetorical hyperbole" comes to mind, *see Letter Carriers*, 418 U.S. at 285-86.) But it's not. CU had adequate grounds to conclude that the Samurai rolled over easily compared to similar vehicles, and that's all it said.

Judge Graber doubtless perused the record with great care in search of something to support Suzuki's case. That she could come up with nothing better than these two statements speaks volumes about the overall accuracy and candor of CU's reporting.

* * *

I have read CU's review of the Samurai and Suzuki's criticism of its methodology. After all that, I can only say I would long hesitate before letting anyone I care about drive or ride in one of these vehicles. If Suzuki wanted me to disregard CU's conclusions, it should have taken the money

it spent on this lawsuit and hired an independent agency to run tests showing that CU's criticisms are unfounded. It could also have tried to improve its product to moot criticism in the future. But, until today, I had thought the one option not available to a company in Suzuki's position was to use its vast financial resources to drag its critics through the gauntlet of our immensely expensive litigation machine. I continue to hope I'm right, or this will be a sad day indeed for consumer organizations and those who rely on them for information vital to their health and safety.

[SEE APPENDIX IN ORIGINAL]

APPENDIX C — SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED AND DECIDED MAY 24, 2000

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SA CV 96-340 AHS (ANx)

SUZUKI MOTOR CORPORATION,

Plaintiff,

v.

CONSUMERS UNION OF UNITED STATES, INC.,

Defendant.

May 24, 2000, Decided

JUDGES: ALICEMARIE H. STOTLER, UNITED STATES DISTRICT JUDGE.

OPINION BY: ALICEMARIE H. STOTLER

OPINION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (APPENDICES AND RELATED ORDERS OMITTED)

Appendix C

I.

PROCEDURAL BACKGROUND

The Court heard oral argument on defendant's motion for summary judgment on June 28, 1999. After complete review of all declarations and exhibits, as hereinafter described, review of the Reporter's Transcript of counsels' oral arguments, and additional independent research, the Court, by this Order, grants defendant's motion.

Consumers Union of United States, Inc. ("CU") filed a Motion for Summary Judgment on May 3, 1999. In support of its motion, CU filed a number of declarations,[1] as well as a Request for Judicial Notice, an Appendix of Extrajudicial Authorities, the Statement of Uncontroverted Facts and Conclusions of Law, and a proposed Judgment. Plaintiff Suzuki Motor Corporation ("Suzuki") filed its opposition on May 24, 1999. In addition to its Memorandum of Points and Authorities, Suzuki filed opposition to CU's Request for Judicial Notice, opposition to CU's documentary exhibits attached to the declarations of Baird and Williams, its Statement of Genuine Issues ("GI"), as required by Local Rule 7.14.2, objections to CU's declarations, and a number of declarations in support of its opposition.[2] CU filed its reply

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1. The declarations of Karpatkin, Pittle, Knoll, Landau, Sheehan, Wood, Small, Conkling, Allen, Nappi, Baird (attached to which are Volumes I through VI containing exhibits 1-148), and Williams (attached to which are Exhibits 149-182).

2. The declarations of Reichert, McCarthy, Cooperrider, Yarborough, Edwards, Guthman, Bottomley, Riley, Rudd, Rogers, (Cont'd)

on June 7, 1999. CU submitted exhibits 393-400 as attachments to the Supplemental Declaration of Williams. In addition, CU filed Objections to Suzuki's declarations, a Response to Suzuki's Statement of Genuine Issues, a Response to Suzuki's objections to CU's Request for Judicial Notice, a Response to Suzuki's Objections to documentary exhibits attached to the declarations of Baird and Williams, and a Response to Suzuki's objections to declarations. With leave of Court, Suzuki filed responses to CU's evidentiary objections on June 23, 1999.

On July 1, 1999, the parties were requested, via minute order, to prepare, serve, and lodge proposed orders regarding their evidentiary objections. The parties then lodged proposed orders on July 19, 1999. Having read and considered the parties' arguments in support of or against admissibility, the Court separately files today those orders which now contain the Court's rulings on the evidentiary objections. Generally speaking, most of the plaintiff's hearsay objections are overruled because many statements and documents are not offered for the truth of the matter stated but as circumstantial evidence bearing on the issue in controversy. On the other hand, many of the defendant's objections to plaintiff's declarations are sustained because the witnesses are not qualified to opine on defendant's state of mind; to the extent that the declarants state factual matter, however, their testimony is accepted.

(Cont'd)

Rasmussen, Murray, Schwartz, Goldie, Gomez, Heywood, Jacobs, Lundquist, McCloskey, Ouellette, Singley, Smith, Theis, Beasley, Garcia, O'Neal, Seidle, Strauss, Tagland, in addition to exhibits 183-392.

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In addition, the Court this date separately files, as Appendix A to Order Granting Defendant's Motion for Summary Judgment, a list of all exhibits submitted by defendant CU in support of its motion as well as its reply. The Court also separately files, as Appendix B to Order Granting Defendant's Motion for Summary Judgment, a list of all exhibits submitted on behalf of plaintiff Suzuki, all of which, whether text, photo, or video, have been reviewed by the Court. The Court has also received, read, and considered plaintiff's Notice of Recent Additional Authority Re Summary Judgment, filed September 23, 1999, and defendant's response thereto filed September 24, 1999. Having considered the parties' arguments in support of and against judicial notice, the Court denies Defendant's Request for Judicial Notice. Certain court decisions contained in the Request for Judicial Notice are otherwise admitted in connection with declarations of witnesses for limited purposes, as ruled upon in the aforementioned orders on evidentiary objections. The Court sustains Suzuki's objections to CU's Objections to Evidence Set Forth in Suzuki's Statement of Genuine Issues and grants Suzuki's request that those objections be disregarded.

II.

FACTUAL OVERVIEW

This action stems from an article that originally appeared in the July 1988 issue of Consumer Reports ("CR"), a monthly magazine published by defendant CU. In the article (Ex. 105), CU opined that the Suzuki Samurai ("Samurai") was "Not Acceptable" because CU's tests showed a tendency

for the car to roll over during an accident avoidance maneuver. Plaintiff Suzuki Motor Corp. Japan is the manufacturer of the Samurai, a sports-utility vehicle. American Suzuki Motor Corp., the American distributor of the Samurai, was originally a plaintiff but was dismissed in the order granting defendant's Motion to Dismiss on February 3, 1997.

In this action, Suzuki asserts that statements referring to the Samurai's rollover tendency, which initially appeared in the 1988 CR article and which have been repeated in various CU and other publications, are false, disparaged the Samurai, and caused Suzuki to suffer damages. While the original complaint and the supplemental complaint contained 22 claims, including defamation and libel claims, the First Amended Complaint contains only three claims, two product-disparagement claims and one claim under California Business & Professions Code § 17200. The Court denied Suzuki's Motion for Leave to File a Second Amended Complaint on April 13, 1999.

In this motion, CU challenges the sufficiency of plaintiff's evidence supporting one essential factual element of its case: whether CU acted with actual malice in reporting on the Samurai on the basis of its 1988 testing. Suzuki points to a number of facts, culled from a voluminous record compiled by both parties, that it contends support a finding of malice. Suzuki highlights the following:

1. After more than three dozen runs in the Samurai on CU's established avoidance maneuver, CU's professional drivers rated it highest of all the vehicles, and expressly stated

"no tendency to tip up" and "no real problem" in the written evaluations. See Plaintiff's Statement of Genuine Issues ("GI"), PP 440-41;

2. After the Samurai completed the standard testing without incident, CU's editor-in-chief, Irwin Landau, remarked that "If you can't find someone to roll this car, I will." Motion at 23-25; GI P 445;

3. CU's technical director, R. David Pittle, then asked to drive the Samurai. After nine more runs and after departing from the established track, the Samurai tipped up. Motion at 24-25; GI PP 452-54;

4. After the tip-up, Pittle directed the chief of CU's auto test division, Robert Knoll, to prepare a new "modified emergency avoidance maneuver" and replicate Pittle's path. GI PP465-67;

5. When driver Richard Small was able to tip up the Samurai on the new course after multiple successful runs by another driver, the test course video and audio tape recorded CU employees cheering, and someone said "All right Ricky baby!" Motion at 22; GI PP 478-83;

6. Landau drafted the article reviewing the Samurai as "Not Acceptable" before the auto test division prepared its usual report on the testing and before the runs on the modified course had been completed by the other vehicles, including one vehicle whose performance was lauded by Landau in the draft. GI PP 521-26;

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7. On the last day of testing, after Landau completed the draft and Pittle signed off on it, and CU had begun to prepare for a press conference to announce the findings, Pittle saw that the drivers were unable to tip the Samurai and exclaimed "Can't you just see it, we get no lift off the ground, Oh God!" Motion at 22; GI P 487;

8. CU refused to reconsider the validity of its testing despite the federal government's conclusion, in September 1988, that CU's "test procedures . . . do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data" and similar findings by other governments. GI P 588;

9. By 1995, CU knew that one of its former test drivers, Lee Baldrick, purchased a Samurai for his own personal use. GI PP 636-44;

10. At the time of CU's testing in 1988, CU was financially overextended due to capital investments. Motion at 20-22; GI PP 732-35.

Suzuki maintains that the totality of evidence that it has presented, and especially the foregoing excerpts, satisfies the requirements of the malice standard and justifies trial proceedings.

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III.

DISCUSSION

A. Standard of Review

To avoid an adverse grant of summary judgment, Suzuki must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 212-213, 106 S. Ct. 2505, 2511 (1986) (quoting Fed. R. Civ. P. 56(e)). The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The inquiry involved in a ruling on a motion for summary judgment necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits, i.e., the "actual quantum and quality of proof necessary to support liability" at trial. Liberty Lobby, 477 U.S. at 252, 254. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. See id.

There is no disagreement that plaintiff must prove actual malice by "clear and convincing evidence." See Plaintiff's Opposition to Motion for Summary Judgment on Issue of Actual Malice at 6. In other words, the Court must determine whether a reasonable fact-finder could conclude that the plaintiff has shown actual malice with convincing clarity.

Liberty Lobby, 477 U.S. at 252. Actual malice is a term of art denoting deliberate or reckless falsification. *See Masson v. New Yorker*, 501 U.S. 496, 499, 115 L. Ed. 2d 447, 111 S. Ct. 2419, 2424 (1991). Malice entails a showing that the defendant made a false statement "'with knowledge that the statement was false or with reckless disregard as to whether or not it was true.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678, 2685 (1989) (quoting *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)). Put another way, defendant must have made the decision to publish the relevant information with a "'high degree of awareness of . . . probable falsity,'" or defendant must have entertained "'serious doubts as to the truth of [the] publication.'" *Harte-Hanks Communications*, 491 U.S. at 667 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964) and *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)).

Whether a plaintiff has shown actual malice is determined on a case-by-case basis, and the courts have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949, 1967 (1984).

B. Application

The merits of CU's motion for summary judgment do not turn on the stability of the Samurai or even the soundness of CU's testing methodology. Rather, the issue is whether

plaintiff has satisfied its evidentiary burden of showing with convincing clarity that CU reported on the Samurai with actual malice. Having viewed all the evidence in the light most favorable to plaintiff, in making a "case-by-case" assessment by looking to all of plaintiff's evidence, and, compressing cartloads of evidence into a legal conclusion, the Court holds that plaintiff has not shown malice by clear and convincing evidence.

First, the trier of fact must necessarily view the context of CU's testing of the Samurai. The trier of fact could not be expected to disregard the nature of defendant's business — testing and reporting on consumer products — nor would plaintiff so urge, and it would be error for a court to so instruct. Thus, it is clear that, based on the information CU had gathered, it was concerned about the safety of the Suzuki Samurai. Defendant was confident that its tests would disclose road-safety dangers, if there were any. This pre-testing concern is not an impermissible mindset for a publisher, particularly one which proclaims its mission as protecting the consumer, and particularly given the background information already known about the Samurai. When the tip-up problem with the vehicle's stability appeared, defendant put the car through more rigorous tests. Plaintiff emphasizes the redesigned test (the "short course") in particular, as if defendant had irreversibly committed itself to testing all products the same, irrespective of new design or technology. All these facts, while relevant, do not evince malice as a matter of law at the requisite legal standard.

Plaintiff's reliance on CU's overextended financial status, supposedly due to its building program, is one example

of plaintiff's attempt to impute a financial motive to defendant in causing distribution of its Samurai review. While a motive in publishing material may bear on malice, the Supreme Court has settled the issue by holding that a goal of increasing one's profits through publishing material is not sufficient to prove actual malice. Harte-Hanks Communications, 491 U.S. at 667 ("If profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from New York Times to Hustler Magazine would be little more than empty vessels.").

Likewise, plaintiff does not explain why CU's difference of opinion with the National Highway Transportation and Safety Administration ("NHTSA," in the evidence)[3] over the acceptability of the driving test should compel the trier of fact to conclude that defendant is for that reason intent upon deliberate or reckless falsification. To the contrary, part of the First Amendment's protection has to do with disagreeing with the government. *See New York Times v. Sullivan*, 376 U.S. 254, 270-71, 11 L. Ed. 2d 686, 84 S. Ct. 710, 721 (1964) (Debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365, 81 L. Ed. 278, 57 S. Ct. 255 (1937)). While the NHTSA evidence is admissible in support of plaintiff's theory of its case, it is not shown to be evidence entitled to greater weight than any other study or opinion regarding vehicle testing methods.

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3. *See* 49 U.S.C. § 105(a) and 49 C.F.R. § 501.1, *et seq.* *See also Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 33, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983), discussing origin and purpose of NHTSA.

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Viewing the evidence presented through the "prism of the substantive evidentiary burden," as stated in Liberty Lobby, the Court concludes that a jury could not reasonably find that plaintiff proves its case by the quality and quantity of evidence required by governing law. Defendant is therefore entitled to judgment as a matter of law.

IV.

CONCLUSION

Accordingly and for the foregoing reasons, the defendant's Motion for Summary Judgment is granted. The Court has modified, signed, and filed defendant's proposed Statement of Uncontroverted Facts and Conclusions of Law as well as defendant's proposed Judgment.

The Clerk is instructed to file the following documents:

1. Order Granting Defendant's Motion for Summary Judgment;

2. Appendix A to Order Granting Defendant's Motion for Summary Judgment (List of Defendant's Exhibits);

3. Appendix B to Order Granting Defendant's Motion for Summary Judgment (List of Plaintiff's Exhibits);

4. Suzuki Motor Corporation's Order on Evidentiary Objections, lodged July 19, 1999;

5. Order re Defendant Consumers Union's Objections to Declarations, lodged July 19, 1999;

6. Defendant's proposed Statement of Uncontroverted Facts and Conclusions of Law, as modified by the Court;

7. Judgment for defendant.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties in this action and enter the Judgment.

Dated: May 24th, 2000.

ALICEMARIE H. STOTLER

UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FILED MAY 24, 2000 AND ENTERED MAY 25, 2000

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
[SOUTHERN DIVISION]

SUZUKI MOTOR CORPORATION JAPAN,
a Japanese corporation,

Plaintiffs,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
a non-profit New York corporation,

Defendant.

Case No. SA CV 96-340 AHS (Anx)

DEFENDANT CONSUMERS UNION'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Appendix D

Date: June 28, 1999
Time: 10:00 a.m.
Dept: Courtroom Of The Honorable Alicemarie Stotler

After consideration of the papers in support of and in opposition to Defendant Consumers Union of United States, Inc.'s ("CU") Motion for Summary Judgment and the oral argument of counsel, the Court determines that there is no genuine issue as to the following facts. Certain assertions are deleted, not because they are untrue, but because they are not relevant to this motion.

UNCONTROVERTED FACTS[1/]

BACKGROUND OF CONSUMERS UNION OF UNITED STATES, INC.

Uncontroverted Fact	**Supporting Evidence**
1. CU was founded in 1936 as a New York not-for-profit organization.	1. Karpatkin Dec., ¶¶ 12, 13.
2. The mission statement of CU is TEST, INFORM, PROTECT.	2. Karpatkin Dec., ¶ 11.

1. These facts are conceded by Defendant Consumers Union solely for the purposes of its Motion for Summary Judgment.

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BACKGROUND OF KEY CU EMPLOYEES

Uncontroverted Fact	Supporting Evidence
12. Rhoda Karpatkin is the President of CU. Karpatkin graduated from Yale Law School with an L.L.B. in 1953 and represented CU as one of its attorneys from 1958 to 1974 until becoming Executive Director/President of CU. In addition to her work for CU, Karpatkin has devoted her entire working life to public service as a lawyer, a member of a variety of consumer commissions, and as a teacher and writer.	12. Karpatkin Dec., ¶¶ 1-6; Exh.112, Exh. 113.
13. Dr. R. David Pittle is the Technical Director and Vice President of CU. Pittle holds a PhD. in Electrical Engineering from the University of Wisconsin. From 1969 to 1973, Pittle was an Assistant Professor in the College of Engineering at Carnegie-Mellon University. In 1973, Pittle was appointed as one of the five original	13. Pittle Dec., ¶¶ 2-11; Exh 1.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Commissioners of the United States Produce Safety Commission. Pittle served on the Commission until 1982, when he joined CU. Pittle is a member of a number of engineering and consumer organizations. Pittle has authored a number of publications and made numerous presentations and lectures regarding the testing of consumer products and consumer product safety.	
14. Robert Knoll was the head of the Automotive Testing Division of CU from 1965 until his retirement in 1997. Knoll holds a Masters Degree in Automotive Engineering and worked for Chrysler engineering for 11 years until 1965, when he joined CU. In 1973, Knoll was appointed to the National Motor Vehicle Safety Advisory by the U.S. Secretary of Transportation, and served for two terms until 1978. In 1990,	14. Knoll Dec., ¶¶ 2-6.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Knoll was appointed by the U.S. Secretary of Transportation to the Motor Vehicle Safety Research Advisory Committee, where he served until 1995. Knoll's entire professional career has been devoted to testing and evaluating automotive products.	
15. Kevin Sheehan holds a Bachelor of Science degree in Mechanical Engineering. He has worked as a engineer for CU for 33 years. During his time at CU, Sheehan has test driven over 1200 cars and other vehicles.	15. Sheehan Dec., ¶¶ 2-6.
16. Richard Small holds a Bachelor of Science degree in Engineering. Small has worked for CU for 26 years, and has held the positions of Technician, Assistant Engineer, Project Engineer and Senior Project Engineer.	16. Small Dec., ¶¶ 2-3.

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Uncontroverted Fact	Supporting Evidence
17. Frederick E. Wood holds a Bachelor of Mechanical Engineering degree from Yale College. Wood worked for CU from 1952 until 1991, and held the position of test engineer from 1959 to 1991.	17. Wood Dec., ¶¶ 2-3.
18. Irwin Landau is the retired Editorial Director of Consumer Reports. Since his retirement from CU in 1994, Landau has acted as an editorial consultant for Consumer Reports. Landau holds a Masters Degree in Journalism from Columbia University. Landau joined CU in 1966, and held the positions of Assistant Managing Editor, Managing Editor, and Editor and Editorial Director. During Landau's tenure at CU, Consumer Reports won a number of national magazine awards. In 1992, Landau received an Award for Distinguished Achievement from the Columbia Graduate School of Journalism.	18. Landau Dec., ¶¶ 2-9.

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Uncontroverted Fact	Supporting Evidence
19. Winifred Conkling holds a Bachelors degree in Journalism from the Medill School of Journalism at Northwestern University. Conkling worked in the Editorial Department at CU from 1984 until 1990.	19. Conkling Dec., ¶ 3.
PRIMARY WORK OF CU	
20. The primary work of CU is comparative testing of consumer products, comparative evaluation of consumer services, and research and analysis of issues affecting consumers.	20. Karpatkin Dec., ¶ 11.
21. Each year, CU puts thousands of products through lengthy and stringent comparative testing.	21. Karpatkin Dec., ¶ 11.
22. The results of CU's testing and research are published in Consumer Reports magazine.	22. Karpatkin Dec., ¶ 11.

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Uncontroverted Fact	Supporting Evidence
23. The results of CU's testing and research are published on CU's radio program.	23. Karpatkin Dec., ¶ 11.
24. The results of CU's testing and research are published in CU's newspaper column.	24. Karpatkin Dec., ¶ 11.
25. The results of CU's testing and research are published on CU's CD-ROMs.	25. Karpatkin Dec., ¶ 11.
26. The results of CU's testing and research are published in outside media.	26. Karpatkin Dec., ¶11.
27. The goal of publishing the results of CU's testing and research is, among other things, to inform and protect the public.	27. Karpatkin Dec., ¶ 11.
THE AUTO TEST PROGRAM	
28. Vehicles are among the thousands of products tested each year by CU.	28. Karpatkin Dec., ¶ 11; Knoll Dec., 5.

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Uncontroverted Fact	Supporting Evidence
29. The vehicle testing is performed by the Automobile Testing Division ("Auto Test Division") of CU.	29. Knoll Dec., ¶ 3;
30. The Auto Test Division tests approximately 40 cars and other vehicles each year.	30. Knoll Dec., ¶ 5; Karpatkin Dec., ¶ 11.
31. Sport utility vehicles are among the vehicles tested each year by the Auto Test Division.	31. Knoll Dec., ¶ 5.
GOALS OF THE AUTO TEST PROGRAM	
32. One goal of the Auto Test Division is to give expert buying and safety advice to the readers of Consumer Reports.	32. Knoll Dec., ¶ 7.
33. In order to provide its best advice to consumers, CU tests and evaluates all aspects of car ownership and car performance.	33. Knoll Dec., ¶ 7.

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Uncontroverted Fact	**Supporting Evidence**
34. The tests used by the Auto Test Division are designed to compare vehicles with one another.	34. Knoll Dec., ¶ 7.
35. The tests used by the Auto Test Division are designed with an absolute scale of acceptable performance.	35. Knoll Dec., ¶ 7.
36. The testing program at the Auto Test Division adapts test methods and techniques used by manufacturers to suit its goals.	36. Knoll Dec., ¶ 8.
37. The Auto Test Division develops its own tests when they believe they will be more relevant to the experience of consumers.	37. Knoll Dec., ¶ 8.
38. In order to achieve a high level of reliability in its auto testing, CU requires all of its test drivers to be fully qualified and trained engineers.	38. Knoll Dec., ¶ 9.

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Uncontroverted Fact	Supporting Evidence
39. After a vehicle arrives at the Auto Test Division, CU drivers routinely drive the vehicle a minimum of 2,000 miles to break it in.	39. Knoll Dec., ¶ 10.
40. After the vehicle has been broken in, the formal testing process begins.	40. Knoll Dec., ¶ 10.
41. A portion of the testing is the "one day trip," a 150 mile drive through the Connecticut countryside.	41. Knoll Dec., ¶ 11.
42. At the test track, CU engineers perform acceleration, breaking and handling tests.	42. Knoll Dec., ¶ 12.
CU'S HANDLING TESTS	
43. The handling tests conducted by CU test normal vehicle handling and emergency vehicle handling.	43. Knoll Dec., ¶ 13.

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EMERGENCY HANDLING TESTS

Uncontroverted Fact	Supporting Evidence
44. CU's emergency handling evaluation consists of a series of tests performed at its test facility. The tests are: closed circuit cornering evaluations on a one-mile course with both high and low speed corners; a maximum lateral acceleration test performed on a skid pad; and an avoidance maneuver performed on the track straightaway with cone spacing to allow speeds in the 45 to 55 mph range.	44. Knoll Dec., ¶ 14.
45. CU subjects all sport utility vehicles and certain pick up trucks and certain minivans to a modified avoidance maneuver in the speed range of 30 to 45 mph.	45. Knoll Dec., ¶ 14.

THE AVOIDANCE MANEUVER

46. In 1973, CU added the avoidance maneuver test to its testing program.	46. Knoll Dec., ¶ 19.

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Uncontroverted Fact	Supporting Evidence
47. The avoidance maneuver is a double lane change maneuver that replicates an emergency situation where a driver suddenly steers a vehicle out of its traffic lane in the opposing lane to avoid an obstacle and then steers quickly back into the original lane to avoid oncoming traffic.	47. Knoll Dec., ¶ 31.
48. The avoidance maneuver was added to the CU testing program at the suggestion of Carl Thelin, an engineer hired by CU in 1972.	48. Knoll Dec., ¶ 19; Exh. 171 (Thelin Deposition, 44:5-20).
49. Thelin was experienced in vehicle handling and safety through his work at General Motors and Calspan Corporation.	49. Knoll Dec., ¶ 19; Exh. 171 (Thelin Deposition 8:1-21; 24:25-26:4).
50. Thelin participated in a series of tests by GM to evaluate the applicability and reproducibility of task performance tests to determine vehicle handling.	50. Knoll Dec., ¶ 19; Exh 36 (CU013689-CU013718 General Motors Report #A-2561, Development of Task Performance Handling Tests, March 10, 1969).

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Uncontroverted Fact	Supporting Evidence
52. CU has used the avoidance maneuver, known as the "long course," from 1973 to the present.	52. Knoll Dec., ¶ 30.
NEGATIVE MEDIA REPORTS REGARDING THE SAMURAI, 1986-1987	
53. On November 21, 1986, *The Washington Post* reported that its reporter nearly experienced a rollover while testing the Samurai.	53. Exh. 18; Exh. 155.
54. On December 26, 1986, the *Philadelphia Daily News* reported on the Samurai: "Make a sudden, abrupt maneuver at speed and you're courting Highway Hari-Kari. A disclaimer sticker on the driver's door warns you too, in case you didn't know."	54. Exh. 18; Exh. 157.
55. On February 1, 1987, *The New York Times* reported in reviewing the Samurai that the "one thing you notice more than any other is a feeling of instability at speed an in the curves" and stated the vehicle was "fairly tipsy."	55. Exh. 18; Exh. 156.

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Uncontroverted Fact	Supporting Evidence
56. On August 27, 1987, the *St. Petersburg Times* reported on Samurai insurance problems and cited a rollover problem with the Samurai.	56. Exh. 121; Exh. 163.

CU'S 1988 TEST PROGRAM

57. Robert Knoll proposed the full schedule for the 1988 automobile test program in a memorandum dated July 21, 1987. The planned program included a group of sport utility vehicles including the Isuzu Trooper II, the Jeep Cherokee, the Nissan Pathfinder, the Mitsubishi Montero, and the Suzuki Samurai.	57. Knoll Dec., ¶ 46; Exh. 42 (CU006419-CU006420).
58. On August 4, 1987, Knoll circulated a 1988 car test program planning memo that included the Suzuki Samurai.	58. Knoll Dec., ¶ 46; Exh. 43 (CU006421-CU006423).

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Uncontroverted Fact	Supporting Evidence
59. The memo was subsequently revised, such that the Jeep Wrangler was added as a vehicle to be tested, and the Nissan Pathfinder and Mitsubishi Montero were eliminated from the program. The final group of vehicles to be tested were the Jeep Cherokee, the Isuzu Trooper II, the Jeep Wrangler and the Suzuki Samurai.	59. Knoll Dec., ¶ 46; Exh. 44 (CU006424-CU006426); Exh. 45 (CU006436- CU006437); Exh. 46.
PRELIMINARY SAMURAI TESTING	
60. On November 23, 1987, CU purchased a new 1988 Suzuki Samurai hardtop for testing. The vehicle was checked and the engine, front end and tires were set to the manufacturer's specifications. The Samurai did not have power steering.	60. Knoll Dec., ¶ 48; Exh. 47 (CU006438-CU006455); Exh. 48 (CU006457- CU006463).
61. As a part of CU's evaluation and break in process of its test vehicles, CU Auto Test Division staff members drive the vehicles for a period of several months.	61. Knoll Dec., ¶ 49.

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Uncontroverted Fact	Supporting Evidence
62. During the evaluation and break in process, the CU staff members keep detailed logs of their driving of the test vehicles.	62. Knoll Dec., ¶ 49; Exh. 49 (CU006467-CU006492).

SUZUKI SAMURAI ROLLOVER DURING ROUTINE DRIVING BY CU FACILITIES MANAGER

63. On February 8, 1988, Alan Hanks, the Facilities Manager of the Auto Test Division, was engaged in routine driving of the Samurai.	63. Exh 49 (CU006467-CU006492); Exh. 170 (Hanks Deposition, 124:10-12; 137:17-138:12).
64. Hanks reported that while he was driving in 4WD high range along a snow covered gravel road at 15 mph, the Samurai rolled over onto its side.	64. Exh 49 (CU006467- CU006492); Exh. 170 (Hanks Deposition, 137:17-138:12).
65. As a result of rolling over on its side, the outside mirror was broken, the driver's window glass was broken, and the left side of the vehicle was dented, fuel leaked from the carburetor,	65. Exh. 49 (CU006467-CU006492); Exh. 50 (CU006494- CU006501); Exh. 170 (Hanks Deposition, 137:17-138:12).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) brake fluid leaked from the master cylinder, and acid leaked from the battery, and the steering wheel was off by 90 degrees.	
66. Hanks took photographs of the accident.	66. Exh. 50, (CU006494-CU006501); Exh. 170 (Hanks Deposition, 147:20 -149:2; 153:2-154:11).
67. Hanks received assistance returning the vehicle to its wheels and drove it to the Auto Test Division.	67. Knoll Dec., ¶ 50; Exh. 170 (Hanks Deposition, 125:22-126:7).
68. Hanks reported the accident to Robert Knoll, head of the Auto Test Division. Hanks was a long time employee of CU and Knoll had no reason to doubt Hanks' report of the incident.	68. Knoll Dec., ¶ 51; Exh. 51 (CU006464); Exh. 170 (Hanks Deposition 142:21-143:3; 147:20-25).

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Uncontroverted Fact	Supporting Evidence
69. Hanks recorded the details of the accident in contemporaneous log book entries.	69. Knoll Dec., ¶ 51; Exh. 49, (CU006467-CY006492); Exh. 170 (Hanks Deposition, 15:11-14; 17:15-18).
70. After the accident, the Samurai was then repaired to its original specifications at a local repair shop.	70. Knoll Dec., ¶ 50; Exh. 49 (CU006467-CU006492); Exh. 51(CU006464); Exh. 170 (Hanks Deposition, 92:25-93:25).
71. The Samurai was returned to the Auto Tests Division and carefully checked.	71. Knoll Dec., ¶ 51; Exh. 49 (CU006486-CU006487; Exh. 51 (CU006464).
KNOWLEDGE OF THE CENTER FOR AUTO SAFETY DEFECT PETITION	
72. On February 23, 1988, the Center for Auto Safety filed a petition for defect investigation with the National Highway Traffic Safety Administration that alleged that the Suzuki Samurai had a rollover defect and requesting a recall of 1986-1988 Samurais.	72. Exhibit 52 (CU006913-CU006919).

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Uncontroverted Fact	Supporting Evidence
73. Robert Knoll, the head of CU's Automotive Testing Division, received a copy of the CFAS petition on February 29, 1988.	73. Knoll Dec., ¶ 53; Exh. 52 (CU006913-CU006919).

AWARENESS OF THE NBC REPORT ABOUT THE DANGERS OF THE SAMURAI

74. On February 29, March 1 and 2, 1988, NBC Television broadcasted a three part series of news stories regarding the safety of the Samurai and its propensity for rollovers ("the NBC Report").	74. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).
75. The NBC Report included video clips of testing of the Samurai by Billy Peterson of the Automotive Safety Testing Facility.	75. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).
76. The testing shown in the NBC Report vividly depicted the Samurai tipping up during test maneuvers.	76. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).

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Uncontroverted Fact	Supporting Evidence
77. The NBC Report showed that outriggers were used during Mr. Peterson's testing of the Samurai to prevent the vehicle from rolling over.	77. Knoll Dec., ¶ 55; Baird Dec., Exh 53 (CU22896).
78. Outriggers are devices placed on the side of a vehicle to prevent it from rolling over in the event of a tip up.	78. Knoll Dec., ¶ 55; Pittle Dec., ¶ 19.
79. In the NBC Report Mr. Peterson states that the addition of outriggers lowers the center of gravity of the vehicle and should improve handling.	79. Knoll Dec., ¶ 55; Baird Dec., Exh 53 (CU22896).
80. The NBC Report included an interview with Brian O'Neill, President of the Insurance Institute for Highway Safety, a non-profit organization.	80. Knoll Dec. ¶ 55; Baird Dec., Exh 53 (CU22896).
81. The NBC Report included an interview with Ben Kelley.	81. Knoll Dec. ¶ 55; Baird Dec., Exh 53 (CU22896).

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Uncontroverted Fact	Supporting Evidence
82. Robert Knoll saw the NBC Report when it was aired.	82. Knoll Dec., ¶ 55.
83. Knoll sent a videotaped copy of the NBC Report to R. David Pittle, CU's Technical Director.	83. Knoll Dec., ¶ 55.
84. Pittle saw the NBC Report.	84. Pittle Dec., ¶ 19.
85. To the best of CU's knowledge, Suzuki never sued NBC over the NBC Report on the Samurai.	85. Pittle Dec., ¶ 42.
PRECAUTIONS TAKEN IN LIGHT OF INFORMATION KNOWN BY CU	
86. After viewing the NBC Report, both Knoll and Pittle were concerned about the safety of CU drivers while testing the Samurai.	86. Pittle Dec., ¶19; Knoll Dec., ¶ 56.
87. Pittle told Knoll to obtain safety outriggers for the Samurai before testing it.	87. Pittle Dec., ¶19; Knoll Dec., ¶ 56.

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Uncontroverted Fact	Supporting Evidence
88. Pittle told Knoll to obtain the outriggers for the Samurai testing because of his concern to keep CU's drivers safe.	88. Pittle Dec., ¶ 19.
89. Knoll called Billy Peterson and arranged to use the outriggers Peterson had used in the tests for the NBC Report.	89. Knoll Dec., ¶ 56.
90. Knoll believed and continues to believe that attaching outriggers to the vehicle would lower the center of gravity and make it more difficult for a rollover to occur.	90. Knoll Dec., ¶ 57.
APRIL 20, 1988 AVOIDANCE MANEUVER TESTING OF FOUR SUVS	
91. On April 20, 1988, CU began performing the Avoidance Maneuver tests on the SUVs scheduled for the July 1988 issue. The vehicles tested were the 1988 models of the Jeep Cherokee, the Isuzu Trooper II, the Jeep Wrangler, and the Suzuki Samurai.	91. Knoll Dec., ¶ 65.

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Uncontroverted Fact	Supporting Evidence
92. The test crew included Fred Wood, the data taker and test director, Kevin Sheehan and Richard Small, the test drivers, Ron Denison, the camera operator, and Robert Knoll, David Pittle and Irwin Landau as observers. No still photographer was present.	92. Knoll Dec., ¶ 65; Wood Dec. ¶ 12; Small Dec., ¶ 4; Sheehan Dec., ¶ 17; Pittle Dec., ¶ 17; Landau Dec., ¶ 10.
93. Sheehan and Small had viewed the NBC Report prior to the testing.	93. Sheehan Dec., ¶ 16; Small Dec., ¶ 4.
94. As of April 20, 1988, CU tested vehicles on one avoidance maneuver, the "long course."	94. Knoll Dec., ¶ 66.
95. Before the first test runs, CU installed the NBC outriggers on the Samurai.	95. Knoll Dec., ¶ 67.
97. Sheehan was the first driver who drove the Samurai through the long course.	97. Sheehan Dec., ¶ 17; Small Dec., ¶ 5; Knoll Dec., ¶ 67.

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Uncontroverted Fact	**Supporting Evidence**
98. Sheehan drove through the long course with the outriggers installed on the Samurai.	98. Sheehan Dec., ¶ 17; Knoll Dec., ¶ 67; Pittle Dec., ¶ 20; Small Dec., ¶ 5.
99. Sheehan did not experience any tip ups during his sequence of runs through the long course. Sheehan reached up to 53 mph during his runs.	99. Sheehan Dec., ¶¶ 17, 18; Pittle Dec., ¶ 20; Knoll Dec., ¶ 67; Small Dec., 5; Wood Dec., ¶ 13.
100. At no time did Sheehan feel as though the Samurai would tip over, a fact he noted in the test log.	100. Sheehan Dec., ¶ 17, Exh. 66 (CU006711).
101. After seeing that Sheehan experienced no tip ups while driving the Samurai, fears about a tip up were allayed. Small and Knoll agreed that Small would drive through the long course without the use of outriggers.	101. Small Dec., ¶ 6; Knoll Dec., ¶ 68; Sheehan Dec., ¶ 18; Pittle Dec., ¶ 20; Wood Dec., ¶ 15.

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Uncontroverted Fact	Supporting Evidence
102. Knoll approved the removal of the outriggers, and Small drove the long course without outriggers attached to the Samurai.	102. Knoll Dec., ¶ 68; Small Dec., ¶ 6; Sheehan Dec., ¶ 18; Wood Dec., ¶ 15; Pittle Dec., ¶ 20.
103. Small completed his sequence of runs without any two wheel tip ups. His fastest speed was 55 mph.	103. Small Dec., 7; Knoll Dec., ¶ 68; Sheehan Dec., ¶ 18; Pittle Dec., ¶ 20; Wood Dec., ¶ 13.
104. Small noted in his contemporaneous log book that the steering was slow, but that the Samurai responded well and recovered quickly.	104. Small Dec., ¶ 7, Exh. 67 (CU006712).
105. After Small completed his sequence of test runs, Pittle asked Knoll if he could drive the Wrangler and the Samurai through the long course.	105. Pittle Dec., ¶ 21; Knoll Dec., ¶ 69.
107. Pittle is an ordinary driver and not a trained professional. He would not consider testing a vehicle he thought might rollover.	107. Pittle Dec., ¶ 23.

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Uncontroverted Fact	**Supporting Evidence**
108. On the tenth run in Pittle's sequence of runs through the long course at 46.5 mph, the Samurai lifted its two right wheels off the road and tipped up.	108. Pittle Dec., ¶ 24; Knoll Dec., ¶ 70; Sheehan Dec., ¶ 19; Small Dec.¶ 8; Wood Dec., ¶ 16; Exh. 68.
110. The tip up was a startling and unexpected occurrence.	110. Pittle Dec., ¶ 24; Knoll Dec., ¶ 70; Sheehan Dec., ¶ 19; Small Dec., ¶ 8; Wood Dec., ¶ 14.
111. Pittle states that he did not purposefully cause the Samurai to tip up. There is *no evidence* to the contrary.	111. Pittle Dec., ¶ 23; Exhs. 168, 169 (Denison Deposition. pp. 147, 148, 232).
112. Persons cheered when Pittle came down safely without injury. They *also cheered earlier* when Pittle made it through the course without knocking over any cones.	112. Knoll Dec., ¶ 70; Sheehan Dec., ¶ 20; Small Dec., ¶ 9; Wood Dec., ¶ 15; Exh. 68.
113. Pittle stopped driving the Samurai and did not drive the Wrangler.	113. Pittle Dec., ¶ 24.

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Uncontroverted Fact	**Supporting Evidence**
114. Had Knoll believed the Samurai would tip up, he would not have allowed Small or Pittle to drive the Samurai without outriggers.	114. Knoll Dec., ¶ 70.
115. All of the other vehicles tested by CU that day completed the long course without incident.	115. Knoll Dec., ¶ 71.
DEVELOPMENT OF THE SHORT COURSE	
116. Knoll determined that Pittle's tip up resulted when Pittle started the first turn a split second late, thereby effectively extending the entry lane, necessitating a sharper right turn around the obstacle cone.	116. Knoll Dec., ¶ 73; Pittle Dec., ¶ 25.
117. Pittle asked Knoll to design a test program.	117. Pittle Dec., ¶ 26.
118. Knoll and other CU engineers reasoned that if they modified the course by shortening the entry distance to the obstacle cone and moving the cone (so as to replicate the path	118. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) driven by Pittle) they could determine if the results were an aberration or if the Samurai and all or some of the other SUVs tested would experience rollovers.	
119. The modification was made to the course to determine how *all of the sport utility vehicles, not just the Samurai*, would react to this maneuver.	119. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.
120. The modified course became known as the "short course."	120. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.
121. There is *no evidence* that anyone instructed Pittle, Small or Wood to *deliberately tip up* the Samurai on the day of the April 20, 1988 testing.	121. Landau Dec., ¶ 56; Knoll Dec., ¶ 111; Pittle Dec., ¶ 27; Sheehan Dec., ¶ 23; Small Dec., ¶ 18; Wood Dec., ¶ 36.

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UNCONTROVERTED TESTIMONY OF RON DENISON

Uncontroverted Fact	Supporting Evidence
123. Ron Denison, a former CU employee who was present at the April 20, 1999 testing, testified that he knew and respected Pittle and considered him a brilliant man, a man of integrity and professionalism. Denison does not believe Pittle would deliberately tip up the Samurai.	123. Exhs. 168, 169 (Denison Deposition, 143:16-144:5; 148:2-6; 232:10-12).
124. Denison testified that he had an especially high regard for Knoll, and believed him to be a man of integrity, honesty, professionalism, and who would never rig a test. Denison does not believe Knoll rigged the Samurai testing nor participate in knowingly put out false test results.	124. Exhs. 168, 169 (Denison Deposition, 144:6-12; 146:19-147:25; 232:8-9).
125. Denison testified that Sheehan is a very honest person, a professional, and a man of integrity.	125. Exhs. 168, 169 (Denison Deposition, 143:9-15; 232:7).

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Uncontroverted Fact	Supporting Evidence
126. Denison testified that Wood is a man of integrity and an honest man. Denison does not believe Wood intentionally tipped up the Samurai.	126. Exhs. 168, 169 (Denison Deposition, 232:24-25; 313:24-314:12).
127. Denison testified that Small is a man of integrity. Denison does not believe that Small was intentionally trying to tip up the Samurai.	127. Exhs. 168, 169 (Denison Deposition, 232:13-14; 314:13-17).
128. When asked whether he thought CU did something dishonest, Denison testified he didn't think CU was dishonest.	128. Exhs. 168, 169 (Denison Deposition 221:14-222:9).
APRIL 26, 1988 TESTING	
129. The next day of testing the vehicles was April 26, 1988. Present at the testing on that day were Joe Nappi, data taker, Fred Wood and Rick Small, test drivers, Ron Denison, camera operator, and Kevin Sheehan, Alan Hanks, and Robert Knoll as observers.	129. Knoll Dec., ¶ 74; Nappi Dec., ¶ 3; Sheehan Dec., ¶ 22; Small Dec., ¶ 11; Wood Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
130. Sheehan asked Knoll to excuse him from driving the Samurai through the short course because he was afraid to drive the vehicle. Sheehan was replaced by Wood. Since then, from 1989 to 1999, Sheehan has driven many vehicles through the short course.	130. Sheehan Dec., ¶ 22; Wood Dec., ¶ 17.
131. Wood was the first test engineer to drive the Samurai through the short course with outriggers attached on April 26, 1988. Wood's fastest successful speed was 42.4 mph.	131. Wood Dec., ¶ 18; Knoll Dec., ¶ 75.
132. On a Wood run at 42.2 mph, both of the right side tires of the Samurai lifted off the pavement, but the Samurai did not tip up all the way on to the outriggers.	132. Wood Dec., ¶ 18; Knoll Dec., ¶75; Small Dec., ¶ 12; Nappi Dec., ¶ 4.

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Uncontroverted Fact	**Supporting Evidence**
133. On a Wood run through the course, at 41.3 mph, the Samurai suddenly tipped up onto the outriggers.	133. Wood Dec., ¶ 18; Knoll Dec., ¶ 75; Small Dec., ¶ 12; Nappi Dec., ¶ 4.
134. Small was the second test engineer to drive the Samurai through the short course. Small also drove with outriggers attached to the Samurai.	134. Small Dec., ¶ 13; Knoll Dec., ¶76; Wood Dec., ¶ 21; Nappi Dec., ¶ 5.
135. On a Small run through the short course, Small experienced a sudden and full tip up onto the outriggers at 40.2 mph.	135. Small Dec., ¶ 13; Knoll Dec., 76; Wood Dec., ¶21; Nappi Dec., ¶ 5.
136. After Small's tip up in the Samurai, Knoll concluded that it was not necessary to make any more test runs of the Samurai because the 1988 Samurai had demonstrated a dangerous rollover propensity, and Knoll did not want to put anyone needlessly at risk.	136. Knoll Dec., ¶ 76; Small Dec., ¶ 13.

Appendix D

Uncontroverted Fact	Supporting Evidence
137. CU next ran the Jeep Wrangler with outriggers attached through the short course and no tip ups occurred.	137. Knoll Dec., ¶ 78; Wood Dec., ¶ 23.
138. CU next ran the Isuzu Trooper II through the short course without any tip up.	138. Knoll Dec., ¶ 78.
139. At no time during tests of the Jeep Wrangler, the Jeep Cherokee or the Isuzu Trooper II was there any tip up.	139. Knoll Dec., ¶ 78; Exh. 71 (CU006748-CU006757).
MAY 12, 1988 TESTING	
140. In late January or early February of 1988, A. Liska at Rogers & Associates, Suzuki's public relations firm, wrote to Knoll regarding CU's purchase of the 1988 Samurai for evaluation.	140. Knoll Dec., ¶ 80.

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Uncontroverted Fact	**Supporting Evidence**
141. Liska's letter to Knoll stated that the 1988½ model year Samurai had suspension modifications that Suzuki claimed would improve its ride.	141. Knoll Dec., ¶ 80.
142. CU believed the suspension modifications on the 1988 ½ Samurai could affect handling and therefore on May 6, 1988, CU purchased a new 1988½ Samurai for evaluation of its handling.	142. Knoll Dec., ¶ 80
143. Testing of the sport utility vehicles continued on May 12, 1988. The vehicles tested were the 1988½ Samurai and the Jeep Cherokee. Comparative testing was performed with the Jeep Wrangler and Ford Festiva.	143. Knoll Dec. ¶¶ 81 84; Pittle Dec., ¶¶ 31, 33.

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Uncontroverted Fact	**Supporting Evidence**
144. Present at the May 12, 1988 testing were Nappi, data taker, Wood and Small, test drivers, a camera operator, and Sheehan, Knoll, Pittle, Joyce Newman, David Berliner, and Alan Hanks, as observers.	144. Knoll Dec., ¶ 81 Pittle Dec., ¶ 31; Small Dec., ¶ 14; Wood Dec., ¶ 24.
145. CU employees believed they had made important findings with respect to the Samurai. CU obtained a professional videographer to record the results of the testing.	145. Pittle Dec., ¶ 32; Knoll Dec., ¶ 81.
146. The head of CU's Office of Public Information and the head of Consumer Reports Television were present at the May 12, 1988 testing as observers due to what CU believed to be important findings regarding the Samurai.	146. Pittle Dec., ¶ 32; Knoll Dec., ¶ 81.

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Uncontroverted Fact	**Supporting Evidence**
147. CU planned to hold a press conference when their findings on the Samurai were fully developed and completed.	147. Pittle Dec., ¶ 32.
148. Small drove the 1988½ Samurai for five runs through the short course with outriggers installed.	148. Small Dec., ¶ 15.
149. On a Small run through the short course, the 1988½ Samurai lifted both right side wheels.	149. Small Dec., ¶ 15; Knoll Dec., ¶ 82; Wood Dec., ¶ 25.
150. On a Small run through the short course, the 1988½ Samurai, there was a sudden and significant tip up onto the outriggers at 38.7 mph.	150. Small Dec., ¶ 15; Knoll Dec., ¶ 83; Wood Dec., ¶ 25; Exh. 72 (CU006798).
151. Wood then drove the 1988½ Samurai. On Wood's second run through the short course, the 1988½ Samurai tipped up onto the outriggers at 37.4 mph.	151. Wood Dec., ¶ 26; Knoll Dec., ¶ 83; Small Dec., ¶ 16; Exh. 73 (CU006797).

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Uncontroverted Fact	**Supporting Evidence**
152. While watching the 1988½ Samurai being driven through the short course on an early run at a low speed, Pittle said, "Can't you just see it, we get no lift off the ground."	152. Pittle Dec., ¶ 34.
153. Small drove the Jeep Wrangler through the short course without outriggers.	153. Wood Dec., ¶ 27; Knoll Dec., ¶ 84.
154. Small achieved clean runs through the short course in the Jeep Wrangler at 40.5 mph.	154. Knoll Dec., ¶ 84.
155. Wood drove the Jeep Cherokee through the short course at 39.75 mph.	155. Knoll Dec., ¶ 84; Wood Dec., ¶ 28.
156. Wood drove the Ford Festiva through the short course for comparative purposes and achieved a clean run at 40.5 mph.	156. Wood Dec., ¶ 28; Knoll Dec., 84.

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Uncontroverted Fact	**Supporting Evidence**
157. In late May 1988, Wood and Small prepared memos describing the steering and handling of the Samurai during the avoidance maneuver tests and sent them to Knoll.	157. Knoll Dec., ¶ 85; Wood Dec., ¶ 29; Small Dec., ¶ 17; Exh. 74 (CU006800); Exh. 75 (CU006815- CU006816).
158. Wood testifies that during the May 12, 1988 testing, he did not deliberately try to roll or tip up the 1988½ Samurai. There is not evidence to the contrary.	158. Wood Dec., ¶¶ 37-39; Small Dec., ¶¶ 19, 20, 23.
159. Small testifies that during the May 12, 1988 testing, he did not deliberately try to roll or tip up the 1988½ Samurai. There is no evidence to the contrary.	159. Small Dec., ¶¶ 20-23; Wood Dec., ¶¶35-39.
160. All of the persons involved with the CU testing and publication of the article believe that the Samurai was tested	160. Small Dec., ¶ 22; Wood Dec., ¶ 39-41.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) fairly and honestly, and subjected to the same test conditions as the other sport utility vehicles.	
BACKGROUND RESEARCH FOR ARTICLE	
161. In connection with research for the article regarding the Samurai, CU employee Winifred Conkling interviewed Sam Cole of the Center for Auto Safety in early March of 1988.	161. Conkling Dec., ¶¶ 6,7; Exh. 87 (CU009692-CU009693).
162. The Center for Auto Safety is a non profit auto safety organization whose reports and findings are widely quoted by many of the country's largest and best known media organizations.	162. Conkling Dec., ¶ 10.
163. Cole gave Conkling statistics regarding rollover accidents.	163. Conkling Dec., ¶ 8.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Conkling cross checked this information with database information from the NHTSA.	
164. Conkling also interviewed Brian O'Neill, the president of the Insurance Institute of Highway Safety on March 3, 1988. O'Neill and Ian Jones provided Conkling with information regarding the center of gravity and mathematical formula for the stability ratio of vehicles.	164. Conkling Dec., ¶ 9; Exh. 85 (CU009707-CU009708).
165. The Insurance Institute for Highway Safety is a not for profit safety organization whose reports and findings are widely quoted by many of the country's largest and best known media organizations.	165. Conkling Dec., ¶ 10.
166. Conkling interviewed Tim Hurd of NHTSA in connection with the Samurai article.	166. Conkling Dec., ¶ 11; Exh. 86 (CU009692-CU009693).

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Uncontroverted Fact	**Supporting Evidence**
167. Conkling interviewed Steve Handelsman of NBC in connection with the Samurai story some time between March 3, 1988 and April 26, 1988.	167. Conkling Dec., ¶ 12; Exh. 87 (CU009713).
168. During Conkling's interview of Handelsman, Handelsman told Conkling that "we have found the Suzuki can roll over in ordinary emergency maneuvers on dry pavement."	168. Conkling Dec., ¶ 12.
169. Conkling forwarded on April 27, 1988 memo to Landau that Conkling prepared for Landau and outlined various materials she was sending to him. Conkling also sent her interview notes to Landau.	169. Conkling Dec., ¶¶ 7, 14; Exh. 84 (CU009690).
170. Conkling forwarded a memo to Landau dated May 2, 1988, regarding interviews she conducted with ten large auto insurance companies regarding insurability problems for the Samurai.	170. Conkling Dec., ¶ 15; Exh. 119 (CU008509-CU008510).

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Uncontroverted Fact	Supporting Evidence
171. Conkling found that some insurance companies had questions concerning Samurai safety.	171. Conkling Dec., ¶ 15; Pittle Dec., ¶ 60; Exh. 119 (CU008509-
DRAFTS AND REVISIONS OF ARTICLE	
172. Between May 2, 1988 and May 26, 1988, the article on the Samurai for the July 1988 Consumer Reports issue went through numerous drafts.	172. Landau Dec., ¶ 14.
173. The drafts of the article were distributed for review and comment to persons within the Editorial and Technical Department, including the Auto Test Division.	173. Landau Dec., ¶ 19; Knoll Dec., ¶91; Exhs. 90, 104; Pittle Dec., ¶¶ 35-39; Wood Dec., ¶ 42; Small Dec., ¶ 25; Sheehan Dec., ¶ 30.
174. The persons in the Editorial Department who reviewed the drafts of the article included Landau, Weber, and Conkling.	174. Landau Dec., ¶ 19.

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Uncontroverted Fact	**Supporting Evidence**
175. The persons in the Technical Department who reviewed the drafts of the article included Pittle, Knoll, Sheehan, Small, and Wood.	175. Landau Dec., ¶ 19; Knoll Dec., ¶91; Exhs. 90, 104; Pittle Dec., ¶¶ 35-39; Wood Dec., ¶ 42; Small Dec., ¶ 25; Sheehan Dec., ¶ 30.
176. Many revisions were made to the various draft versions of the manuscript leading up to the final article.	176. Landau Dec., ¶¶ 19, 23-51; Knoll Dec., ¶ 90, 91; Pittle Dec., ¶¶ 35-40.
177. The purpose of the lengthy reviewing, revising and checking process was to do all CU could to assure that the final published article was truthful, scientifically accurate, and comprehensible to the readers of Consumer Reports.	177. Landau Dec., ¶ 20.
178. CU's normal practice in connection with drafting stories about vehicle testing is for the Auto Test Division staff to write a Technical Report to Editorial.	178. Knoll Dec., ¶ 88; Landau Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
179. The Technical Report forms the basis for the article and contains an introduction, a body, a car by car analysis and recommendations and data tables of facts and figures.	179. Knoll Dec., ¶ 88.
180. The Technical Report is then sent to Editorial when it is complete. A writer would then add additional research material, have the manuscript fact checked and turn it into a draft of the final article.	180. Knoll Dec., ¶ 88.
181. The procedure followed in connection with the July 1988 article regarding the Samurai was slightly different. The Auto Test Division wrote the car by car stories and analysis, data tables and their recommendations, but Landau wrote the portion of the article regarding the Samurai.	181. Exh. 76 (CU006714-CU006747); Exh. 77 (CU006758-CU006759); Exh. 78 (CU006760-CU006796).

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Uncontroverted Fact	Supporting Evidence
182. Landau decided to write the Samurai portion of the article himself because rating a vehicle "Not Acceptable" was unusual and Landau wanted CU to bring to bear its highest level of editorial oversight, skill, and experience.	182. Landau Dec., ¶ 14; Knoll Dec., ¶ 89.
183. The Auto Test Division still had some testing to complete, so Knoll sent a draft of the Technical Report, rather than the final version, to Landau. Landau received the Technical Report on May 2, 1988.	183. Knoll Dec., ¶ 90; Landau Dec., ¶¶ 17, 30; Exh. 76 (CU006714-CU006747).
184. Handwritten corrections dated May 5, 1988 by Sheehan, Small, and Wood were made to the draft.	184. Exh. 76 (CU006714-CU006747).
185. The Auto Test Division prepared a revised version of the Technical Report dated May 6, 1988. The May 6, 1988 draft has handwritten corrections made by Auto Test engineers.	185. Exh. 77 (CU006758-CU006795).

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Uncontroverted Fact	Supporting Evidence
186. The May 6, 1988 draft was sent to Landau around that same date.	186. Landau Dec., ¶ 31.
187. After Landau received the draft Technical Report, he wrote the portion of the article on the Samurai. Landau wrote the Samurai portion of the article between May 2 and May 9, 1988, most likely between the 6th and the 9th.	187. Landau Dec., ¶ 18, 32; Exh. 89 (CU010252-CU010264).
188. At the time Landau first wrote the Samurai portion of the article in early May of 1988, Landau believed that the testing of all of the vehicles he described had been completed.	188. Landau Dec., ¶ 18.
189. Landau's belief was based on the fact that at some point between April 26, 1988 and May 12, 1988, Knoll communicated to Landau that all three other vehicles had successfully completed the testing on the short course.	189. Knoll Dec., ¶ 90; Landau Dec., ¶ 18.

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Uncontroverted Fact	**Supporting Evidence**
190. The testing of the Jeep Cherokee on the short course was not completed until May 12, 1988.	190. Knoll Dec., ¶ 90.
191. Because the May 12, 1988 testing was consistent with Landau's earlier draft of the article, no changes were made to any reported results in later drafts of the article.	191. Landau Dec., ¶ 18.
192. In addition to receiving the Technical Report, Landau also had numerous informal conversations with Knoll regarding the progress of testing and test results.	192. Landau Dec., ¶ 17; Knoll Dec., ¶ 90.
193. Landau also obtained information from Conkling, including interview notes and other research as well as materials from CU's Library in preparation for the article.	193. Landau Dec., ¶17; Exhs. 84, 85, 86, 87.
194. Landau shared these materials with Mary Weber who was assisting him in editing and writing the article.	194. Landau Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
195. During early May 1988, Landau and Weber edited the Technical Report for style and turned it into the first editorial draft of the Consumer Reports article.	195. Landau Dec., ¶ 17.
196. After Landau wrote his revised second draft of the Samurai portion of the July 1988 article, he sent copies to Knoll and Weber. It was circulated for review on May 9, 1988.	196. Landau Dec., ¶ 33; Exh. 90 (CU010265-CU010278).
197. On May 9, 1988, Pittle edited a draft of the Consumer Reports article rating the Samurai "Not Acceptable."	197. Pittle Dec., ¶ 30; Exh. 2 (CU010238-CU010251).
198. At the time Pittle reviewed the draft on May 9, 1988, Pittle believed that the testing of the other vehicles reported in the draft had been completed.	198. Pittle Dec., ¶ 30.

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Uncontroverted Fact	Supporting Evidence
199. A third draft of the Samurai portion is dated May 9, 1988. By the time of this draft, the Samurai portion had been circulated to Pittle and to legal counsel for legal review.	199. Landau Dec., ¶ 34; Exh. 2 (CU010238-CU010251).
200. Landau circulated the drafts of the Samurai portion to Knoll and the Auto Test Division staff for their review and comment on May 10 or 11, 1988.	200. Knoll Dec., ¶ 90; Landau Dec., ¶ 35; Exh. 79 (CU006801-CU006814).
201. The Auto Test Division staff made revisions and comments on the draft and returned it to Landau.	201. Knoll Dec., ¶ ¶ 89-90; Landau Dec., ¶¶ 19, 35; Exh. 79 (CU006801-CU006814).
202. On May 10, 1988, a draft of the article combining the Samurai portion of the article with the Technical Report was prepared as it was being fashioned into the Consumer Reports article.	202. Landau Dec., ¶ 36; Exh. 91 (CU010279-CU010325).

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Uncontroverted Fact	**Supporting Evidence**
203. Another draft of the Technical Report as it was being fashioned into the Consumer Reports article was prepared after May 10, 1988.	203. Landau Dec., ¶ 37; Exh. 92 (CU010326-CU010379).
204. The first printer's proof of the Samurai portion of the article, dated May 17, 1988, was reviewed and corrected by Pittle on May 18, 1988.	204. Pittle Dec., ¶ 35; Landau Dec., ¶ 38; Exh. 3, (CU009632-CU009637).
205. The first proofreading master copy of the entire article is dated May 18, 1988. It was circulated to the Technical Department and the Library for review.	205. Landau Dec., ¶ 39; Exh 93 (CU010179-CU010203).
206. The Library Check Copy of the Samurai portion of the article is dated May 18, 1988 and shows the checked source of each paragraph of the introductory portion of the article.	206. Landau Dec., ¶ 40; Exh 94 (CU009655-CU009660).

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Uncontroverted Fact	**Supporting Evidence**
207. The Library Check Copies of the remainder of the May 18, 1988 draft show the checked sources for statements made in the article.	207. Landau Dec., ¶ 41; Exhs. 95, 96, 97, 98, 99 (CU009661-CU09680).
208. The page proof of the article, dated May 20, 1988, was reviewed and edited by Pittle.	208. Pittle Dec., ¶ 36; Landau Dec., ¶ 42; Exh. 4 (CU009638-CU009647).
209. The page proof of the article, dated May 20, 1988, was also reviewed and corrected by the Auto Test Division staff.	209. Landau Dec., ¶ 43; Exh. 100 (CU010225-CU010236).
210. Editorial made corrections to the proofreading master copy of the May 20, 1988 page proof of the article.	210. Landau Dec., ¶ 44; Exh. 101 (CU010151-CU010159).
211. On May 24, 1998, Pittle reviewed and edited the revised page proof of the article.	211. Pittle Dec., ¶ 37; Landau Dec., ¶ 45; Exh. 5 (CU009648-CU009651).

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Uncontroverted Fact	**Supporting Evidence**
212. Additional corrections were made to the proofreading master revised page proof dated May 24, 1988.	212. Landau Dec., ¶ 46; Exh 102 (CU01060-CU010165).
213. On May 26, 1988, Pittle reviewed and edited the May 26, 1988 revised proof of the article.	213. Pittle Dec., ¶ 38; Landau Dec., ¶ 47; Exh. 6 (CU009652-CU009653).
214. Additional edits to the May 26, 1988 proofreading master copy of the article were made by the Technical Division.	214. Landau Dec., ¶ 48; Exh. 103 (CU010166-CU010174).
215. The May 26, 1988 page proof was then reviewed by the Editorial Department.	215. Landau Dec., ¶ 49.
216. The change in the term "tread width" to "tread" was checked with Knoll.	216. Landau Dec., ¶ 49.
217. Knoll believes that the drafts of the Technical Report and July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Knoll believes otherwise.	217. Knoll Dec., ¶ 91.

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Uncontroverted Fact	**Supporting Evidence**
218. Sheehan believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Sheehan believes otherwise.	218. Sheehan Dec., ¶ 30.
219. Small believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Small believes otherwise.	219.Small Dec., ¶ 25.
220. Wood believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Wood believes otherwise.	220. Wood Dec., ¶¶ 42, 43.
221. Pittle believes the article was and is truthful, fair and accurate. There is no evidence that Pittle believes otherwise.	221. Pittle Dec., ¶ 107.

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Uncontroverted Fact	Supporting Evidence
222. Landau believes the article was and is truthful, fair and accurate. There is no evidence that Landau believes otherwise.	222. Landau Dec., ¶¶ 53, 57.
223. Conkling believes the article was and is truthful, fair and accurate. There is no evidence that Conkling believes otherwise.	223. Conkling, ¶ 18.
CU'S POLICIES AND PROCEDURES FOR THE ARTICLE REVIEW PROCESS	
224. All copy that goes into Consumer Reports magazine is repeatedly checked for accuracy before publication.	224. Landau Dec., ¶ 21.
225. Principal responsibility for checking product review articles rests with the Library and the Technical Department. Copy is reviewed and any needed changes are passed on to the Editorial Department.	225. Landau Dec., ¶ 21.

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Uncontroverted Fact	**Supporting Evidence**
226. The Library checks all articles for grammar, coherence and sense, and checks the accuracy of the facts reported in the articles against sources provided by the writer.	226. Landau Dec., ¶ 21.
227. Product articles are largely based on reports provided to the Editorial Department by the Technical Department.	227. Landau Dec., ¶ 22.
228. The Library is responsible for checking the accuracy of all facts based on editorial research.	228. Landau Dec., ¶ 22.
229. The stages of the copy process are: Manuscript, Galley (sometimes revised), Page Proof (often revised), and Ready for Casting. The printer's copy, which communicates all changes to the printer of the next versions, is produced by the Editorial Department between each of the stages of copy.	229. Landau Dec., ¶ 23.

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Uncontroverted Fact	**Supporting Evidence**
230. One copy of each article is identified as the "Library Check Copy" which is the main Library copy and is part of the permanent record of each published article.	230. Landau Dec., ¶ 23.
231. The Library Check Copy is proofread, copy-checked and sourced. Suggested changes are followed up with Editorial until and sometimes beyond the closing of the article.	231. Landau Dec., ¶ 23.
232. In connection with product articles, the Library reviews Galley and Ready for Casting copy. All statements that do not come from the Technical Report are sourced.	232. Landau Dec., ¶ 24.
233. The writer provides any sources other than the Technical Report to the Library at the Galley stage, along with the sourced galley.	233. Landau Dec., ¶ 24.

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Uncontroverted Fact	Supporting Evidence
234. The Technical Department is responsible for checking technical data.	234. Landau Dec., ¶ 24.
235. Whenever a product is to be judged "Not Acceptable," or if the manuscript severely criticizes a product or implies a safety problem, the draft manuscripts for the article are sent to counsel for legal review.	235. Landau Dec., ¶ 26.
236. All of CU's policies and procedures were followed in connection with the writing and publication of the July 1988 article regarding the Suzuki Samurai.	236. Landau Dec., ¶ 27.
THE FINAL ARTICLE	
237. Rhoda Karpatkin, the president of CU and the person with ultimate responsibility at CU, reviewed the final article before it was published.	237. Karpatkin Dec., ¶¶ 22, 23.

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Uncontroverted Fact	Supporting Evidence
238. CU believed at the time it published the article and still believes that the article was truthful, accurate, and fair.	238. Karpatkin Dec., ¶ 23; Pittle Dec., ¶ 113; Knoll Dec., ¶ 113; Landau Dec., ¶ 53; Conkling Dec., ¶ 18.
239. The final article appeared in the July 1988 issue of Consumer Reports.	239. Landau Dec., ¶ 50; Exh. 105 (CU007353-CU007361).
THE JUNE 2, 1988 PRESS CONFERENCE	
240. CU decided its findings regarding the safety of the Samurai warranted a public announcement at a press conference.	240. Pittle Dec., ¶ 32; Landau Dec., ¶ 59.
241. CU believed it was paramount to get important safety information to the public.	241. Karpatkin Dec., ¶ 27(b); Landau Dec., ¶ 59; Exh. 107 (CU005094-CU005101).
242. It is CU's policy not to disclose its test results to manufacturers or the government before releasing the information to consumers.	242. Pittle Dec., ¶¶ 43-45; Exh. 8 (CU004033-CU004037).

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Uncontroverted Fact	**Supporting Evidence**
243. The day before the June 2, 1988 press conference, Pittle sent a letter for overnight delivery to Douglas Mazza of American Suzuki Motor Corp., Suzuki's American subsidiary, expressing CU's concerns regarding the Samurai and enclosing a prepublication copy of the article.	243. Pittle Dec., ¶ 43; Exh 7 (CU013973).
244. By the time of the June 2, 1988 press conference, the July 1988 Consumer Reports article was completed.	244. Pittle Dec., ¶ 46.
245. Pittle was satisfied that all references to Suzuki and to the Samurai in the article were fully truthful and accurate, a belief he holds to this day.	245. Pittle Dec., ¶ 46.
246. On June 2, 1988, CU sent a letter to NHTSA in support of the Center for Auto Safety Petition and filed a petition for rulemaking with NHTSA to develop a rollover standard.	246. Pittle Dec., ¶ 47; Exh. 126 (CU005412-CU005418); Exh. 175.

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Uncontroverted Fact	**Supporting Evidence**
247. CU held a press conference on June 2, 1988, at which it announced that the Suzuki Samurai had shown a hazardous propensity to roll over in CU's tests, and that the vehicle would be rated "Not Acceptable" in an article to appear four weeks later in the July 1988 issue of Consumer Reports.	247. Pittle Dec., ¶ 48.
248. Dr. Pittle spoke at the June 2, 1988 press conference.	248. Pittle Dec., ¶ 48.
249. Dr. Pittle declares that he sought to be truthful in all of his comments at the press conference and did not act with any malice toward Suzuki or the Samurai. Dr. Pittle states his only goal was to advise the public of what he and CU believed to be a serious danger to consumers. There is no evidence to the contrary.	249. Pittle Dec., ¶ 48.

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Uncontroverted Fact	**Supporting Evidence**
250. At the time he made the statements at the press conference, Pittle believed that all of the statement he made were true.	250. Pittle Dec., ¶ 107.
251. During the press conference, Dr. Pittle referred to CU drivers making 90-180 degree turns as the amount which the drivers turned the steering wheel during the testing. This is what the drivers originally believed and told Dr. Pittle, a view that they subsequently changed and a change that is immaterial to CU's rating of the Samurai.	251. Pittle Dec., ¶ 49.
252. At the June 2, 1988 press conference, when Pittle described the maneuver as "benign."	252. Pittle Dec., ¶ 49.

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INVESTIGATION BY THE ATTORNEYS' GENERAL, JUNE 1988

Uncontroverted Fact	Supporting Evidence
255. In June of 1988, Dr. Pittle learned that the Attorneys General of several states were investigating Suzuki regarding misleading advertising for the Samurai.	255. Pittle Dec., ¶ 56.
256. The Attorneys General contacted CU to obtain video footage of CU's testing of the Samurai. On June 20, 1988, CU provided the videotape that was shown at the press conference.	256. Pittle Dec., ¶ 56; Exh. 16 (CU004129).

CONSUMERS ASSOCIATION OF ENGLAND FINDS THE SAMURAI DANGEROUS, JULY 1988

257. On July 19, 1988, Consumers' Association of England issued a press release calling for a halt to sales in the United Kingdom of the Suzuki SJ 413 (Samurai) and the Suzuki SJ 410.	257. Exh 11 (CU006909-CU006912).

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Uncontroverted Fact	Supporting Evidence
258. Consumers Association is a not for profit British organization devoted to objectively testing and reporting on consumer products for the benefit of the consumer. Consumers Association produces a series of monthly magazines publishing test results on a range of consumer products, including cars.	258. Exh. 173 (Expert Report of Andrew Jarmin, ¶¶ 2, 4, 5).
259. In June 1988, Consumers Association put the Suzuki Samurai through CU's short course and CU's long course and the J-turn. The Samurai tipped up on two wheels during the short course and tipped up at 20 mph during the J-turn.	259. Exh. 173 (Expert Report of Andrew Jarmin, ¶¶ 12, 13, 15).
260. Dr. Pittle read the Consumers' Association press release on July 19, 1988 and sent a copy of it to Knoll the same day.	260. Pittle Dec., ¶ 52; Exh. 11 (CU006909-CU006912).

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Uncontroverted Fact	Supporting Evidence
261. On August 3, 1988, Julian Edwards of Consumers' Association sent Dr. Pittle a faxed message regarding additional testing Consumers' Association had performed on the Samurai regarding the J-turn test. The message warned CU not to perform the J-turn test with the Samurai because the vehicle begins to roll over at 20 mph.	261. Pittle Dec., ¶ 53; Exh. 12 (CU006904).
262. On August 26, 1988, Dr. Pittle received from Edwards a copy of an article to be published in the September 1988 issues of *Which?*, the magazine of Consumers' Association. The article was entitled "Danger" Suzukis Roll Over, Our Tests – and the Experiences of Suzuki Owners – Show that Suzuki SJs Can Roll Over at Speeds as Low as 20 mph."	262. Pittle Dec., ¶ 54; Exh. 13 (CU026634-CU026636).

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Uncontroverted Fact	Supporting Evidence
263. The *Which?* article was devoted to discussing Consumer Association's tests and reports of actual Suzuki Samurai rollover accident victims in Britain.	263. Pittle Dec., ¶ 54; Exh. 13 (CU026634-CU026636).
264. Consumers' Association followed up the September 1988 article in October of 1988 and April of 1990, again reporting on the Samurai's rollover propensity.	264. Pittle Dec., ¶ 55; Exh. 14 (CU006980); Exh. 15 (CU006984-CU006989).
265. Consumers Association disagreed with the British Government's refusal to recall the Samurai.	265. Exh. 174 (Jarmin Deposition, 177:5-180:5); Exh 173 (Expert Report of Andrew Jarmin, Exhs. F, H).
THE LOTUS REPORT	
267. In 1988, Lotus Engineering prepared a report on the Samurai for Suzuki.	267. Exh. 144; Exh. 154.

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Uncontroverted Fact	**Supporting Evidence**
268. In connection with preparing the report on the Samurai, Lotus made the following finding regarding the Consumers Union test: "The CU2 lane change maneuver is a test designed to simulate an accident avoidance condition which could occur on public roads. As with other simulated tests, the benefits are those of consistent environmental conditions and of repeatability within the confines of driver consistency. It is considered that simulated lane change manoeuvres carried out in controlled conditions represent only a small proportion of real world situations, but do allow reasonably accurate comparative assessments to be undertaken."	268. Exh. 144; Exh. 154.

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CU'S RESPONSE TO NHTSA DENIAL OF THE CFAS PETITION, SEPTEMBER 1988

Uncontroverted Fact	Supporting Evidence
269. NHTSA denied the CFAS petition.	269. Pittle Dec., ¶ 50.
270. CU learned of NHTSA's 1988 decision to deny the CFAS petition in early September 1988.	270. Pittle Dec., ¶ 50.
271. After the CFAS petition was denied, Conkling was assigned to work with the Auto Test Division staff in analyzing the decision and preparing a response.	271. Conkling Dec., ¶ 16.
272. CU's engineers and researches analyzed NHTSA's published denial and disagreed substantively with NHTSA's ruling and written decision. CU disagreed with any implication in the written decision that CU's tests did not have a scientific basis or a link to real work crash avoidance.	272. Pittle Dec., ¶ 50.

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Uncontroverted Fact	Supporting Evidence
273. On September 18, 1988, Conkling wrote a memo to Landau, Knoll, and Pittle containing the analysis	273. Conkling Dec., ¶ 17; Pittle Dec., ¶ 50; Exh. 9 (CU007249-CU007261).
274. The analysis showed that in CU's opinion, NHTSA was improperly interpreting accident data.	274. Conkling Dec., ¶ 17; Pittle Dec., ¶ 50; Exh 9 (CU007249-CU007261).
275. In November of 1988, CU published an article expressing its disagreement with NHTSA's 1988 findings on the Samurai.	275. Pittle Dec., ¶ 50; Exh 10; Conkling Dec., ¶ 17.
276. CU believed then and believes now that NHTSA was mistaken in its failure to open a defect investigation concerning the Samurai's rollover propensity.	276. Pittle Dec., ¶ 50.

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CU'S HISTORY OF DISAGREEMENT WITH NHTSA

277. CU's disagreement with NHTSA goes back to 1978 when NHTSA decided against opening a safety investigation of the Dodge Omni and Plymouth Horizon which CU had rated "Not Acceptable" because of their performance in both the long course and another test called the free control maneuver.	277. Knoll Dec., ¶¶ 97-98.
278. CU believes that NHTSA did not reject the validity of its tests but simply did not believe that CU's tests were not sufficient evidence to open a defect investigation.	278. Knoll Dec., ¶ 98; Exh. 81 (CU005685-CU005695).
279. CU repeated its disagreement with NHTSA and its continuing belief in the validity of its test in subsequent issues of *Consumer Reports*: "CU believes NHTSA should initiate a full defect investigation" (August 1978); "Federal safety regulations do not as yet cover vehicles handling as such, and	279. Exh 139 (CU005630); Exh. 140 (CU005631-CU005632); Exh. 141 (CU005648-CU005649).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) the NHTSA has consistently avoided involvement in such subjective areas" (October 1978); "And the [NHTSA] whose own test results were identical to ours, had refused to interpret those results as a safety problem requiring a mandatory recall" (October 1979).	
280. The 1988 article regarding the Samurai refers to NHTSA as a "reluctant watchdog."	280. Exh. 105 (CU007353-CU007361).
281. CU reiterated its disagreement with NHTSA over vehicle standards in the September 1997 issue of Consumer Reports: "Over the last 18 years, NHTSA has refused to investigate other SUVs that may have posed a risk of rollover. . . . The agency should now develop a safety standard to evaluate emergency handling and detect rollover problems."	281. Exh. 182 ("Government Won't Investigate Isuzu Trooper" *Consumer Reports* (Sept. 1997)).

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SUZUKI SETTLES WITH ATTORNEYS GENERAL, MARCH 1989

Uncontroverted Fact	Supporting Evidence
282. In March of 1989, CU learned that Suzuki settled the action brought by the Attorneys General of seven states in which the Attorneys General charged that Suzuki had issued false and misleading advertising for the Samurai involving its safety and rollover danger.	282. Pittle Dec., ¶ 56.
283. Under the settlement agreement with the Attorneys General, Suzuki agreed to pay $200,000 and include a warning in future advertising regarding potential rollovers.	283. Exh. 17 (CU005157).

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CU GIVES FAVORABLE REVIEW TO SUZUKI PRODUCTS

Uncontroverted Fact	Supporting Evidence
284. Since 1988, CU has tested and reported on other Suzuki Products, including the Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, and the Esteem and Geo models manufactured by Suzuki such as the Tracker.	284. Pittle Dec., ¶ 108; Exhs. 117, 118.
285. The Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker were put through the short course and all passed. The Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker were all judged acceptable by CU.	285. Pittle Dec., ¶ 108.
286. In June 1989, CU said of the Suzuki Sidekick in Consumer Reports: "The Geo Tracker/Suzuki Sidekick is exactly the vehicle the Suzuki Samurai	286. Pittle Dec., ¶ 108; Exh 82 (CU003182-CU003191).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) should have been. It's small and nimble and handles almost like a passenger car on the road. It's fuel economy and braking are top notch."	
287. Suzuki never complained that CU ran the Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker through the short course.	287. Pittle Dec., ¶ 108.
AWARENESS OF DISTRICT COURT'S DECISION IN MALAUTEA, EARLY 1992	
291. CU became aware of the *Malautea* decision early in 1992.	291. Pittle Dec., ¶ 64.
292. The *Malautea* decision bolstered CU's existing belief in the validity of CU's tests and CU's interpretation of the results.	292. Pittle Dec., ¶ 66.

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Uncontroverted Fact	Supporting Evidence
293. CU began work on a report on the *Malautea* decision in March 1992. Pittle edited a draft of the article on March 10, 1992. CU's Library	293. Pittle Dec., ¶ 64; Exh. 21 (CU010994-CU010997); Exh. 22 (CU010999-CU011000).
294. *Consumer Reports* published a one page report on the *Malautea* decision in the May 1992 issue of Consumer Reports. The report was entitled "Did Suzuki Ignore Warnings About Samurai? Court Papers Say Yes."	294. Pittle Dec., ¶ 64; Exh. 20.
295. Suzuki never complained to CU or sued CU about the May 1992 article.	295. Pittle Dec., ¶ 64.
ELEVENTH CIRCUIT'S DECISION IN MALAUTEA, 1993	
298. CU was advised that following this affirmance of the default judgment, Suzuki entered into a confidential settlement with Mr. Malautea.	298. Pittle Dec., ¶ 67.

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Uncontroverted Fact	Supporting Evidence
299. The Eleventh Circuit's affirmance reinforced CU's belief in the truth of CU's reports on the Samurai.	299. Pittle Dec., ¶ 67.
300. Consumer Reports reported on the affirmance in a May 9, 1997 press release.	300. Pittle Dec., ¶ 67; Exh. 120.

SUZUKI TERMINATES SALES OF SAMURAI IN U.S., 1995

305. In 1995, Suzuki terminated sales of the Samurai in the United States.	305. Exh.180 (Chandler Deposition, 101:1-12).

CU'S EXPERIENCE WITH THE SHORT COURSE SINCE THE SAMURAI TESTING IN APRIL 1988

306. From April 1988 to August 1996, CU tested 48 different models of SUVs, compact trucks, and minivans on the short course.	306. Knoll Dec., ¶ 92.
307. Other than the Suzuki Samurai in 1988 and the Isuzu Trooper in 1996, none of the other 46 vehicles	307. Knoll Dec., ¶ 92.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) tested through August 1996 demonstrated a rollover propensity so serious as to warrant being rated "Not Acceptable."	
308. In 1989, the Ford Bronco II lifted two wheels during CU's short course testing.	308. Knoll Dec., ¶ 93.
309. The Bronco II lifted its wheels slowly and not as high as the Samurai.	309. Knoll Dec., ¶ 93.
310. CU judged the Bronco II's emergency handling as poor and recommended consumers avoid buying it.	310. Knoll Dec., ¶ 93.
311. CU did not rate the Bronco II "Not Acceptable" because CU believed the wheel lift was less severe and more easily recoverable than the Samurai.	311. Knoll Dec., ¶ 93.

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Uncontroverted Fact	Supporting Evidence
312. In 1992, CU tested the 1992 Mitsubishi Montero and the 1992 Isuzu Trooper.	312. Knoll Dec., ¶ 94.
313. Both the 1992 Mitsubishi Montero and the 1992 Isuzu Trooper had an overall pattern of making clean runs or sliding out, except for a single run with a low level tip up in each vehicle.	313. Knoll Dec., ¶ 94.
314. CU found there was no pattern of repeated tip up on either the 1992 Mitsubishi Montero or the 1992 Isuzu Trooper so CU did not rate the vehicles' handling as poor.	314. Knoll Dec., ¶ 94.
315. As of April 1999, CU has tested a total of 77 vehicles on the short course.	315. Knoll Dec., ¶ 92.
316. As of April 1999, only the Samurai and Trooper were rated "Not Acceptable" by CU based on its testing.	316. Knoll Dec., ¶ 92.

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Uncontroverted Fact	Supporting Evidence
318. CU has referenced the historical fact of its 1988 "Not Acceptable" rating of the Samurai on at least 24 occasions during the period between July 1988 and the middle of 1995.	318. Pittle Dec., ¶ 69.
319. CU has referenced the historical fact of the 1988 "Not Acceptable" rating of the Samurai in Consumer Reports, its annual buying guide issues, and in various editions of Consumers Union's books on new and used cars.	319. Pittle Dec., ¶ 69; Exh. 137.
NO COMPLAINT FROM SUZUKI ABOUT REPUBLICATIONS	
321. Not once during the years from 1988 to 1995 seven to CU about any of those republications, nor did Suzuki bring suit against CU during that period.	321. Pittle Dec., ¶ 69; Karpatkin Dec., ¶ 28.
322. Suzuki's silence in the face of these reports strengthened CU's belief in the validity of CU's reports on the Samurai.	322. Pittle Dec., ¶ 69.

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REPUBLICATIONS WITHIN THE STATUTE OF LIMITATIONS PERIOD, APRIL 1994 TO APRIL 1996

Uncontroverted Fact	Supporting Evidence
323. In April 1995, CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. April 1995). The Card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	323. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2).
324. In November 1995, CU published the following in its Electronic File, *Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center*, 1996 Edition (CD-ROM): "'In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore	324. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 93, Exh. E.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) judge it Not Acceptable.'" "With those words, CONSUMER REPORTS made worldwide headlines in the summer of 1988. CONSUMER REPORTS' engineers tested the 1988-model Samurai, along with three other sport utility vehicles at our auto-test facility in Connecticut. During moderate-speed emergency maneuvers designed to duplicate the kind of evasive action a driver might take to avoid, say, a child darting into traffic, the Samurai began to roll over onto its side. "The 1998 Suzuki Samurai demonstrated a design so dangerous that it put people's lives in jeopardy. Once CONSUMER REPORTS' tests revealed this critical safety hazard, sales of sales of this once-popular car plummeted."	
325. In November 1995, CU published in its Electronic Files, Reviews of Suzuki Samurai, model years 1987 through 1994, in Consumer	325. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to

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Uncontroverted Fact	Supporting Evidence
(Cont'd)	
Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1996 Edition (CD-ROM) (ca. Nov. 1995). The File stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn." "Safety Alert" linking to file, "How Consumer Reports Protects You," supra.	Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 94.
326. In 1996, CU published Electronic File, Consumers Union, "Summary Judgement," Compuserve (ca. 1996). The File stated: "the Suzuki Samurai was "Rated Not Acceptable because of its tendency to roll over during a hard turn."	326. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 91.

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Uncontroverted Fact	Supporting Evidence
327. In January 1996, CU published a column, "Memo to Members," Consumer Reports (Jan. 1996). The column stated: "Product safety is still a problem. The number of watchdogs has increased over the years, and Government agencies have taken a goodly number of unsafe products off the market. Yet we still find products that are unsafe: From kerosene heaters to the Suzuki Samurai to safety seats, CONSUMER REPORTS has called them out – and our work goes on."	327. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 87, Exh. C.
328. In January 1996, CU published an article, "It's Our Anniversary," Consumer Reports (Jan. 1996). The article stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS	328. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to

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Uncontroverted Fact	Supporting Evidence
(Cont'd) discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	Interrogatory No. 2); First Amended Complaint, ¶ 88, Exh. C.
329. In January 1996, CU published Electronic File, Consumers Union, "It's Our Anniversary," America On-Line (commencing Jan. 1996). The File stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the	329. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 89, Exh. D.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
330. In January 1996, CU published Electronic File, Consumers Union, "It's Our Anniversary," Compuserve (commencing ca. Jan. 1996). The File stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power	330. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 90.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
SUZUKI FILES SUIT, APRIL 1996	
331. Suzuki filed this action against CU on April 11, 1996, eight years after CU originally published the July 1988 article.	331. Complaint For Damages for Libel and Product Disparagement, For Injunctive Relief Under Cal. Bus. & Prof Code § 17200, And For Declaratory Relief, filed April 11, 1996.
INFORMATION MADE AVAILABLE TO CU FOLLOWING LAWSUIT, MAY 1996	
338. CU knew of no testing and reports issued by foreign governments other than that performed by Great Britain until after April 11, 1996, when Suzuki filed its lawsuit. Suzuki did not bring these findings to the attention of CU before it filed its complaint.	338. Pittle Dec., ¶¶ 103-104.

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ANOTHER VEHICLE TIPS UP ON THE SHORT COURSE, JUNE 1996

Uncontroverted Fact	Supporting Evidence
339. In June, July and August of 1996, CU conducted a series of tests on four different 1996 model SUVs, the Isuzu Trooper/ Acura SLX, the Toyota 4Runner, the Nissan Pathfinder, and the Chevrolet Tahoe, as well as a new 1995 Isuzu Trooper.	339. Knoll Dec., ¶ 96; Pittle Dec., ¶ 76.
340. None of the vehicles tested in this period were equipped with outriggers because CU did not expect any tip up or rollover with the large type of SUVs.	340. Pittle Dec., ¶ 76.
341. On June 6, 1996, a slight tip up of the Isuzu Trooper occurred in the long course test.	341. Pittle Dec., ¶ 76.
342. On June 6, 1996, the 1996 Isuzu Trooper lifted both inside wheels during the short course test.	342. Pittle Dec., ¶ 76.

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Uncontroverted Fact	Supporting Evidence
343. CU conducted additional testing of these vehicles on June 26, 1996 and on July 10, 1996.	343. Pittle Dec., ¶ 76.
344. The performance of both the 1995 and 1996 Trooper and the Acura SLX led Knoll and the Auto Test Engineers to recommend that the vehicle be rated "Not Acceptable."	344. Knoll Dec., ¶ 96; Pittle Dec., ¶ 76.
345. Dr. Pittle agreed that the 1995 Isuzu Trooper and 1996 Isuzu Trooper/Acura SLX warranted a rating of "Not Acceptable."	345. Pittle Dec., ¶ 76.
THE AMMERMAN DECISION	
348. The *Ammerman* trial court referred to auto manufacturers as using emergency maneuvers to evaluate vehicles for rollover propensity.	348. Exh. 136, p.5; 167, p.5.

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Uncontroverted Fact	Supporting Evidence
349. The *Ammerman* ruling solidified CU's belief in the validity of CU's short course.	349. Knoll Dec., ¶ 42.
AUGUST 20, 1996 PRESS CONFERENCE	
364. Based upon CU's testing of the Isuzu Trooper/Acura SLX, and the confirmation of the tests' validity provided by Allen's opinion letter, CU held a press conference on August 20, 1996 to announce its findings regarding the Trooper/SLX and to announce that these vehicles would be rated "Not Acceptable" in the October 1996 issue of Consumer Reports.	364. Pittle Dec., ¶ 80.
365. At the August 20, 1996 press conference, CU referred to its 1988 Suzuki Samurai findings as a part of its report on the 1996 Isuzu Trooper/ Acura SLX in order to place the Trooper matter in proper historical context.	365. Pittle Dec., ¶ 110; Karpatkin Dec., ¶ 28.

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Uncontroverted Fact	**Supporting Evidence**
366. The Trooper was the first motor vehicle rated "Not Acceptable" by CU as a result of avoidance maneuver testing since 1988.	366. Pittle Dec., ¶ 110; Karpatkin Dec., ¶ 28.
369. At no time has CU had any doubt concerning the truth of any statements about the Suzuki Samurai in the August 20, 1996 press conference or the article in the October 1996 issue of Consumer Reports concerning the Isuzu Trooper/Acura SLX.	369. Pittle Dec., ¶ 107; Knoll Dec., ¶¶ 109, 113; Karpatkin Dec., ¶ 23; Landau Dec., ¶ 57; Sheehan Dec., ¶ 30; Small Dec., ¶¶ 25, 26; Wood Dec., ¶¶ 42, 43.
370. At no time has Pittle ever had any doubt concerning the truth of any statements in any articles, press conferences, or other material published by CU regarding the Suzuki or the Samurai.	370. Pittle Dec., ¶ 107.

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Uncontroverted Fact	Supporting Evidence
371. CU believed and continues to believe that all of its statements are true, fair, and accurate.	371. Pittle Dec., ¶ 107; Knoll Dec., ¶¶ 109, 113; Karpatkin Dec., ¶ 23; Landau Dec., ¶ 57; Sheehan Dec., ¶ 30; Small Dec., ¶¶ 25, 26; Wood Dec., ¶¶ 42, 43.

CU FILES PETITION WITH NHTSA FOR DEFECT INVESTIGATION OF ISUZU TROOPER/ACURA SLX, AUGUST 1996

372. On August 20, 1996, CU filed petitions with NHTSA seeking a defect investigation of the Trooper/SLX and also requesting the development of a standard that would produce meaningful, comparative data on the emergency handling characteristics of different makes and models of SUVs.	372. Pittle Dec., ¶ 81; Knoll Dec., ¶ 96.
373. CU filed the defect petition and the rulemaking petition with NHTSA because CU believes in its tests and	373. Pittle Dec., ¶ 83; Knoll Dec., ¶ 96.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) the public importance of its safety judgments and the need for safer vehicles.	
374. At the time CU filed the defect petition, CU knew NHTSA would likely deny the petition and again criticize CU's testing.	374. Pittle Dec., ¶ 81.
CU'S NHTSA SUBMISSIONS REGARDING THE TROOPER	
375. In October 1996, while preparing CU's submissions to NHTSA regarding rollover problems with SUVs in general and the Trooper/ SLX in particular, CU obtained the documents submitted to NHTSA by Suzuki in the 1988 petition by CFAS for a Samurai defect investigation.	375. Pittle Dec., ¶ 84.

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Uncontroverted Fact	**Supporting Evidence**
376. In reviewing the documents submitted to NHTSA by Suzuki in 1988, CU learned that (NHTSA was misled by Suzuki in 1988 as to the scientific and real-world nature of CU's short course avoidance maneuver test) and that Suzuki had not disclosed to NHTSA GM's earlier rejection of Suzuki's request for GM to market the Samurai.	376. Pittle Dec., ¶ 84.
377. On October 10, 1996, CU submitted to NHTSA full and complete documentation of its Summer 1996 testing of SUVs, including the tests of the Trooper/SLX.	377. Pittle Dec., ¶ 85.
378. On December 23, 1996, CU filed voluminous materials in support of its petition for a defect investigation of the Trooper/ SLX and for development of an emergency handling test for SUVs.	378. Pittle Dec., ¶ 86; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).

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Uncontroverted Fact	Supporting Evidence
379. The materials submitted to NHTSA by CU on December 23, 1996 included detailed engineering analyses by independent engineering experts.	379. Pittle Dec., ¶ 86; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).
380. CU's December 23, 1996 submission to NHTSA also included the depiction of similar maneuvers in commercials by auto makers such as Ford, Mercedes, Cadillac, Chevrolet and Toyota in order to sell cars to the public.	380. Pittle Dec., ¶ 87; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).
381. Chrysler and Ford use the CU long course and short course avoidance maneuvers tests on their vehicles.	381. Exhs. 28, 29, 178, 179.
382. On March 19, 1997, Suzuki filed an opposition to CU's petition regarding Isuzu.	382. Pittle Dec., ¶ 95.

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Uncontroverted Fact	Supporting Evidence
383. On April 10, 1997, CU filed a response to Suzuki's filing.	383. Exh. 33 (CU024940-CU025023).
384. CU's work on the Isuzu submissions to NHTSA further reinforced its belief that CU's tests are scientific and valid and that the ratings of the Samurai and the Trooper/ SLX were justified and appropriate.	384. Pittle Dec., ¶ 96.
385. The Insurance Institute for Highway Safety and the Advocates for Highway safety submitted letters supporting CU's petition.	385. Exh. 123; Exh. 124.
386. On May 14, 1997, NHTSA granted CU's rulemaking petition to commence work on an emergency handling standard.	386. Exh. 130 (CU507379-CU507383).

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Uncontroverted Fact	Supporting Evidence
387. On July 24, 1997, NHTSA denied CU's 1996 petition for defect investigation of the Isuzu Trooper/Acura SLX.	387. Knoll Dec., ¶ 100.
388. NHTSA also released a report by its Vehicle Research and Test Center entitled Tests Concerning Rollover Propensity of 1995-96 Isuzu Trooper and 1996 Acura SLX (May 1997) which documented the results and analysis of testing performed on the Trooper/ SLX in connection with CU's petition.	388. Knoll Dec., ¶ 100.
389. After receiving NHTSA's decision, Knoll and other employees of CU and CU's consultants and counsel analyzed NHTSA's Petition Analysis, the technical VRTC Report, and other documents in NHTSA's files in an effort to understand the decision.	389. Knoll Dec., ¶ 101; Pittle Dec., ¶ 99.

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Uncontroverted Fact	Supporting Evidence
391. CU believes that NHTSA's decision reflected an inherent bias against identifying a defect based on evidence of rollover propensity.	391. Knoll Dec., ¶ 101.
392. CU believes that NHTSA's decision did not establish that CU's tests lacked validity.	392. Knoll Dec., ¶ 101.
394. CU believes that NHTSA's test results, including tip ups, are not dissimilar to CU's test results. CU believes NHTSA's decision did not establish that CU's tests lacked validity, but rather reflected a difference in the interpretation of the results of the testing.	394. Pittle Dec., ¶ 105; Knoll Dec., ¶ 101.
395. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's peer vehicle parameter was	395. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) flawed because the parameters were related to static rather than dynamic stability of the vehicles an peer vehicle.	
396. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's analysis of complaints to the Office of Defect Investigations was flawed because the database that NHTSA used reported primarily component malfunctions, rather than a failure of a vehicle's design.	396. Knoll Dec., ¶ 102.
397. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA'S analysis of Consumers Union's computer simulations of the Trooper's dynamic performance (using a	397. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) program called VDANL) was flawed because NHTSA presented no information indicating that changes in the program would have made any difference in the outcome of the simulations provided to it.	
398. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's oversteer/understeer analysis was flawed because NHTSA's own test data clearly show evidence of a potential oversteer problem in the Trooper/SLX.	398. Knoll Dec., ¶ 102.
399. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NSTSA's driver variability analysis was	399. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) flawed because the Office of Defect Investigations' observation regarding the different driver strategies for completing the CU course is consistent with the data from the statistical analysis undertaken by Ian Jones that CU included as a part of its December 23, 1996 submission to NHTSA.	
400. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's vehicle test comparison was flawed because NHTSA chose an incorrect peer vehicle. NHTSA did not choose several peer vehicles from different manufacturers as is its usual practice.	400. Knoll Dec., ¶ 102.
401. CU believes NHTSA was incorrect in its decision on the Isuzu	401. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) petition because CU believes NHTSA's outrigger effects analysis was flawed because no tests described in the Petition Analysis or the VRTC Report were performed without outriggers on a course with the same dimensions as the Consumers Union short course at speeds high enough to demonstrate an outrigger effect. Consumers Union believes that outriggers lower the vehicle's center of gravity and therefore make a slight difference in performance on the short course — favoring the stability of the test vehicle.	
402. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's analysis of the reliability of Consumers Union's	402. Knoll Dec., ¶ 102.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) test was flawed because CU believes NHTSA did not analyze Consumers Union's data using appropriate statistical techniques that are standard in scientific research.	
403. CU disagrees with NHTSA's reliance upon Fatal Accident Reporting System (FARS) data in its analysis of Consumers Union's Trooper petition.	403. Knoll Dec., ¶ 102.
REPUBLICATIONS AFTER SUZUKI FILED SUIT, APRIL 1996 TO PRESENT	
404. In June 1996, CU published an article, "How safe are SUVs?," Consumer Reports (June 1996). The article stated: "The old Suzuki Samurai had a tendency to tip over in sharp turns – so much that we rated it Not Acceptable when we tested it in 1988. Because of that	404. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) experience, instituted an additional, tighter emergency-avoidance test for SUVs. All four vehicles in this month's report passed that test and all our other handling tests without incident."	
405. In August 1996, CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. August 1996). The Card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	405. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
406. On August 20, 1996, CU distributed a videotape to television news media. The video segment depicting a Suzuki Samurai tipping up on outriggers, filmed on or about May 12, 1988.	406. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd)	
	Interrogatories, Response to Interrogatory No. 2).
407. On August 20, 1996, CU distributed a Background Paper, "Consumer Reports' Avoidance Maneuver" distributed at a press conference. The Paper stated: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver."	407. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
408. On August 20, 1996, CU published an article, "How the two SUVs failed our avoidance test" and distributed it to the press. The article stated: "Since 1988,	408. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's

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Uncontroverted Fact	Supporting Evidence
(Cont'd) when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint,¶ 100, Exh. G.
409. On August 20, 1996, CU distributed to the press an article, "Not Acceptable: Isuzu Trooper/Acura SLX" ("pre-press copy.") The article stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	409. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 99, Exh. G.

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Uncontroverted Fact	Supporting Evidence
410. At a Press Conference on August 20, 1996, CU stated: "[T]hese outriggers have little or no effect on the performance of the vehicle. . . ." "The first time we saw this problem [of rollover] was in 1988 with the Suzuki Samurai." "We evaluated the Suzuki Samurai in 1988. That was the first car we had ever seen that went up on two wheels like this, and we called it Not Acceptable."	410. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
411. In an interview of CU representatives by MSNBC on August 20, 1996, CU representatives stated: "In the last eight years, since we have been running this particular short course [i.e., the modified maneuver], only two cars have gone on two wheels like this. One was the Suzuki	411. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Samurai in 1988. . . . We issued a warning. We rated that car Not Acceptable. It did the same thing the Trooper did. . . . In the intervening eight years, 46 other cars have gone through with no problem."	Complaint, ¶ 101, Exh. H.
412. Consumer Union, Petition for Rulemaking, Defect Investigation and Appropriate Enforcement to NHTSA, dated Aug. 20, 1996 stated: "Since it found in its 1988 tests a similar rollover propensity of the Suzuki Samurai, Consumers Union has tested 47 other sport-utility vehicles, light trucks and minivans under these same conditions. The Isuzu Trooper/Acura SLX twins are the first since the 1988 tests to demonstrate this propensity to a degree that Consumers	412. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Union has judged the vehicles 'Not Acceptable.'" The "pre-press" copies of the "Not Acceptable" and "How the two SUVs failed our avoidance test" articles, described above, were attached to the Petition.	
413. In October, 1996, CU published an article, "Special Report. SUV Safety. Not Acceptable. Isuzu Trooper/Acura SLX," Consumer Reports (Oct. 1996). The article stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	413. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 102; Exh. H.

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Uncontroverted Fact	**Supporting Evidence**
414. In October 1996, CU published an article, "How the two SUVs failed our avoidance test," Consumer Reports (Oct. 1996). The article stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	414. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 103, Exh. I.
415. In October 1996, CU issued a Fundraising Card, captioned, "T.I.P.s.," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. October 1996). The card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	415. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
416. In November 1996, CU published a column, "Memo to Members," Consumer Reports (Nov. 1996). The column stated: "One of the SUVs that failed [the avoidance maneuver] was the Suzuki Samurai in 1988."	416. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
417. In November 1996, CU published Electronic Files, Review of Suzuki Samurai, model years 1987 through 1995, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1997 Edition (CD-ROM) (ca. Nov. 1996). The Files stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn."	417. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 107, Exh. Q.

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Uncontroverted Fact	Supporting Evidence
418. In January 1997, CU published on the Web "Timeline," which stated: "Summer 1988: "While subjecting the Suzuki Samurai sport-utility vehicle (SUV) to the Consumers Union avoidance-maneuver test, the vehicle tips up on two wheels (without safety out-riggers) and threatens to overturn. In order to evaluate rollover propensity, CU shortens the length of the course slightly and makes the turning angle sharper, as it would be in a suburban or urban driving situation. The Samurai tips up severely and repeatedly (with safety outriggers), although three other SUVs remain stable throughout this 'short course' avoidance-maneuver test. As a result of its dangerous performance, Consumer Reports rates the Suzuki Samurai 'Not Acceptable'	418. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 106, Exh. P.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) in its July 1988 issue." "Rhoda H. Karpatkin, CU's president [said,] 'From the start, we have been convinced that Suzuki's meritless claims are an effort to prevent us from continuing to speak out when we find a car is unsafe. We remain committed to testing cars and informing the public fully and objectively about their safety and performance.'"	
419. In July 1997, CU issued a Press Release, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," which stated:" In 1988, and again in 1996, NHTSA turned down petitions to investigate the Suzuki Samurai, a vehicle that showed serious rollover problem in our tests, and that has been involved in 147 deaths and some	419. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) 7000 injuries. ""Since 1988, we have tested 57 sport utility vehicles, minivans, and compact trucks on our special emergency-handling course, and only the Trooper, the Acura SLX, the Suzuki Samurai, and the Bronco II have shown a significant tendency to tip."" Consumer Union has been testing cars for over 60 years. Our work has stood the test of time and the scrutiny of the marketplace: Tens of millions of American consumers have found our automobile information reliable, and justifiably so. When we find a major safety problem in a car which happens rarely we take it very seriously, and do everything we can to alert consumers. We have also done our best to get the government to	

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Uncontroverted Fact	Supporting Evidence
(Cont'd) take appropriate steps. The government's failure to act on the Trooper/SLX and other highly rollover-prone vehicles is a serious failure, and a disservice to consumers. We are independent and objective. We stand by our tests, and will continue to alert the public to the safety problem these vehicles pose."	
420. In July 1997, CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackl [sic] Rollover Hazard," <http://www.consumer.org/cunhtsa.html> (since ca. July 25, 1997). [Same as press release]	420. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
421. In July 1997, CU published on the World Wide Web World Wide Web, "Auto Safety Agency Fails Again to Tackle Rollover	421. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Hazard," <http://www.prnewswire.com/> at Company News On Call: Consumer Reports/Consumers Union (commencing ca. July 25, 1997). [Same as press release]	United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
422. In September 1997, CU published a Column, "Frontlines. Safety Update. Government Won't Investigate Isuzu Trooper," Consumer Reports (Sept. 1997). The column stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . .	422. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) ". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
423. In September 1997, CU published "Government Won't Investigate Isuzu Trooper," <www.consumerreports.org/Categories/Cars Trucks/Reports/9709trop.htm>, Consumer Reports Online (since ca. Sept. 1997), which stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the	423. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Suzuki Samurai showed such a marked tendency to tip . . . "... in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
424. In November 1997, CU published an Article, "How Safe Are SUVs?,: Consumer Reports 60 (Nov. 1997). The article stated: "Of the 61 SUVs, minivans, and pickup trucks we've tested in the last nine years, only two SUVs have tipped up so severely that we judged them Not Acceptable: the 1988 Suzuki Samurai and the 1995-96 Isuzu Trooper and its twin, the 1996 Acura SLX."	424. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Based on the foregoing Uncontroverted Facts, the Court now makes its,

CONCLUSIONS OF LAW

1. The statute of limitations for product disparagement is 2 years.[2/]	1. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 14:11-13; *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986).
2. Suzuki can only claim product disparagement dating back to April 1994.	2. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 14:11-13.
3. To prove product disparagement, Suzuki must establish: 1) publication of a statement of and concerning the quality of a product;	3. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7; *Blatty v.*

2. This conclusion of law is made solely for the purposes of CU's Motion for Summary Judgment.

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(Cont'd) 2) falsity; 3) malice; 4) special damages.	*New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986); *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d 547, 572 (1989).
4. To prove violation of California Business and Professions Code § 17200, Suzuki must establish 1) publication of a statement of and concerning the quality of a product; 2) falsity; 3) malice; 4) defendant profited from the publication of the statement.	4. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986).
5. First Amendment standards apply to Suzuki's product disparagement claim.	5. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4: 1-7; *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d, 548, 576 (3rd Dist. 1989).

6. First Amendment standards apply to Suzuki's claim under California Business & Professions Code § 17200.	6. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4: 1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d, 548, 576 (3rd Dist. 1989).
7. CU is a media defendant.	7. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:5-6; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 493 n.8.
8. Suzuki is a "limited purpose public figure."	8. Exh. 149; Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:3-5; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244 (1984).

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9.	Where plaintiff is a public figure, proof of actual malice is required.	9.	*New York Times v. Sullivan*, 376 U.S. 254, 280 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Bose v. Consumers Union of United States*, 466 U.S. 485, 511 n. 30 (1984).
10.	Because Suzuki is a limited purpose public figure, Suzuki must prove CU acted with actual malice.	10.	Exh. 149; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 256 (1984).
11.	Proof of actual malice is required when the statement is of and concerning a matter of public interest.	11.	*Melaleuca Inc. v. Clark*, 66 Cal. App.4th 1344, 1355 (1998); *Nizam-Aldine v. City of Oakland*, 47 Cal.App.4th 364, 373 (1996); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).
12.	Product safety is a matter of public concern.	12.	*Quantum Electronics Corp. v. Consumers Union*, 881 F.Supp. 753, 764 (D.R.I. 1995); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980).

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13. Because Suzuki is a public figure and product safety is a matter of public concern, Suzuki must prove the CU acted with actual malice.	13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Quantum Electronics Corp. v. Consumers Union*, 881 F.Supp. 753, 764 (D.R.I. 1995); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
14. Mere negligence or extreme departure from accepted journalism standards does not constitute actual malice.	14. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 111 S.Ct. 2419, 2429 (1991).
15. Evidence of a pecuniary motive cannot prove actual malice.	15. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); Sack, *Libel, Slander & Related Problems*, (2d ed. 1984) p. 295.
16. The test for actual malice is a subjective test under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue.	16. *Alioto v. Cowles Communications, Inc.*, 430 F.Supp. 1363, 1365-1366 (N.D.Cal. 1977); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984).

17. "Actual malice" is with knowledge of falsity or with reckless disregard for the truth or falsity of the statement.	17. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).
18. To prove actual malice, the plaintiff must show that the defendant in fact entertained serious doubts as to the truth of the publication.	18. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
19. At the summary judgment stage, the First Amendment requires that in addition to proving the challenged statements were false, the plaintiff bears the higher burden of demonstrating that the defendant acted with actual malice by clear and convincing evidence.	19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
20. CU's actual belief at the time it published and republished its statements about the Samurai has not been shown to consist of an intent to act with actual malice.	20. *Alioto v. Cowles Communications, Inc.*, 430 F.Supp. 1363, 1365-1366 (N.D.CAl. 1977); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984).

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21. When CU published and republished its statements about the Samurai, CU has not been shown to have acted with reckless disregard for the truth or falsity of its statements about the Samurai.	21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).
22. When CU published and republished its statements about the Samurai, CU has not been shown to have entertained any doubt as to the truth of the statements it made about the Samurai.	22. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
24. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in April 1995 when it published 1995, Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.	24. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

25. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1995, when CU published the following in its Electronic File, *Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center*, 1996 Edition (CD-ROM): "'In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable.'" "With those words, CONSUMER REPORTS made worldwide headlines in the summer of 1988. CONSUMER REPORTS' engineers tested the 1988-model Samurai, along with three other sport utility vehicles at our auto-test facility in Connecticut. During moderate-speed	25. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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emergency maneuvers designed to duplicate the kind of evasive action a driver might take to avoid, say, a child darting into traffic, the Samurai began to roll over onto its side.
"The 1998 Suzuki Samurai demonstrated a design so dangerous that it put people's lives in jeopardy. Once CONSUMER REPORTS' tests revealed this critical safety hazard, sales of sales of this once-popular car plummeted."

26. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1995, when CU published in its Electronic Files, Reviews of Suzuki Samurai, model years 1987 through 1994, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1996 Edition (CD-ROM) (ca. Nov. 1995) which stated: "Rated Not	26. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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Acceptable because of its tendency to roll over during a hard turn." "Safety Alert" linking to file, "How Consumer Reports Protects You," supra.	
27. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in 1996, when CU published Electronic File, Consumers Union, "Summary Judgement," Compuserve (ca. 1996) which stated: "the Suzuki Samurai was "Rated Not Acceptable because of its tendency to roll over during a hard turn."	27. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
28. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published a column, "Memo to Members," Consumer Reports which stated: "Product safety is still a problem. The number	28. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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of watchdogs has increased over the years, and Government agencies have taken a goodly number of unsafe products off the market. Yet we still find products that are unsafe: From kerosene heaters to the Suzuki Samurai to safety seats, CONSUMER REPORTS has called them out – and our work goes on."

29. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published an article, "It's Our Anniversary," Consumer Reports which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products,

29. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
30. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published Electronic File, Consumers Union, "It's Our Anniversary," America On-Line, which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	30. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

31. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published Electronic File, Consumers Union, "It's Our Anniversary," Compuserve which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	31. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
32. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in June 1996,	32. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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when CU published an article, "How safe are SUVs?," Consumer Reports (June 1996) which stated: "The old Suzuki Samurai had a tendency to tip over in sharp turns – so much that we rated it Not Acceptable when we tested it in 1988. Because of that experience, instituted an additional, tighter emergency-avoidance test for SUVs. All four vehicles in this month's report passed that test and all our other handling tests without incident."

33. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in August 1996, when CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." (ca. August 1996) and bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.

33. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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34. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed a videotape to television news media that depicts a Suzuki Samurai tipping up on outriggers, filmed on or about May 12, 1988.	34. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
35. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed at a press conference a Background Paper, "Consumer Reports' Avoidance Maneuver" which stated: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver."	35. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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36. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU published and distributed the the press an article, "How the two SUVs failed our avoidance test" which stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	36. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
37. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed to the press an article, "Not Acceptable: Isuzu Trooper/Acura SLX" ("pre-press copy.") which	37. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	
38. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU stated at a press conference: "[T]hese outriggers have little or no effect on the performance of the vehicle. . . ." "The first time we saw this problem [of rollover] was in 1988 with the Suzuki Samurai." "We evaluated the Suzuki Samurai in 1988. That was the first car we had ever seen that went up on two wheels like this, and we called it Not Acceptable."	38. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

39. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice, when, in an interview of CU representatives by MSNBC on August 20, 1996, CU representatives stated: "In the last eight years, since we have been running this particular short course [i.e., the modified maneuver], only two cars have gone on two wheels like this. One was the Suzuki Samurai in 1988. . . . We issued a warning. We rated that car Not Acceptable. It did the same thing the Trooper did. . . . In the intervening eight years, 46 other cars have gone through with no problem."	39. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
40. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice when it published Consumer Union, Petition for Rulemaking,	40. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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Defect Investigation and Appropriate Enforcement to NHTSA, dated Aug. 20, 1996 which stated: "Since it found in its 1988 tests a similar rollover propensity of the Suzuki Samurai, Consumers Union has tested 47 other sport-utility vehicles, light trucks and minivans under these same conditions. The Isuzu Trooper/Acura SLX twins are the first since the 1988 tests to demonstrate this propensity to a degree that Consumers Union has judged the vehicles 'Not Acceptable.'" The "pre-press" copies of the "Not Acceptable" and "How the two SUVs failed our avoidance test" articles, described above, were attached to the Petition.

41. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996, when CU published an article, "Special Report. SUV Safety. Not

41. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) Acceptable. Isuzu Trooper/ Acura SLX," Consumer Reports (Oct. 1996) which stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	
42. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996 when CU published an article, "How the two SUVs failed our avoidance test," Consumer Reports (Oct. 1996) which stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically,	42. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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and it would have rolled over without our outriggers. We rated it Not Acceptable."

43. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996, when CU issued a Fundraising Card, captioned, "T.I.P.s.," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." (ca. October 1996) and bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.	43. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
44. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1996, when CU published a column, "Memo to Members," Consumer Reports which stated: "One of the SUVs that failed [the avoidance maneuver] was the Suzuki Samurai in 1988."	44. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

45. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1996, when CU published Electronic Files, Review of Suzuki Samurai, model years 1987 through 1995, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1997 Edition (CD-ROM) which stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn."	45. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
46. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1997, when CU published on the Web "Timeline," which stated: "Summer 1988: "While subjecting the Suzuki Samurai sport-utility vehicle (SUV) to the Consumers Union avoidance-maneuver test,	46. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd)

the vehicle tips up on two wheels (without safety outriggers) and threatens to overturn. In order to evaluate rollover propensity, CU shortens the length of the course slightly and makes the turning angle sharper, as it would be in a suburban or urban driving situation. The Samurai tips up severely and repeatedly (with safety outriggers), although three other SUVs remain stable throughout this 'short course' avoidance-maneuver test. As a result of its dangerous performance, Consumer Reports rates the Suzuki Samurai 'Not Acceptable' in its July 1988 issue."

"Rhoda H. Karpatkin, CU's president [said,] 'From the start, we have been convinced that Suzuki's meritless claims are an effort to prevent us from continuing to speak out when we find a car is unsafe. We remain committed to testing cars and informing the public fully and objectively about their safety and performance.'"

47. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU issued a Press Release, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," which stated: "In 1988, and again in 1996, NHTSA turned down petitions to investigate the Suzuki Samurai, a vehicle that showed serious rollover problem in our tests, and that has been involved in 147 deaths and some 7000 injuries." "Since 1988, we have tested 57 sport utility vehicles, minivans, and compact trucks on our special emergency-handling course, and only the Trooper, the Acura SLX, the Suzuki Samurai, and the Bronco II have shown a significant tendency to tip." "Consumer Union has been testing cars for over 60 years. Our work has stood the test of time and the scrutiny of the marketplace: Tens of millions	47. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

(Cont'd)

of American consumers have found our automobile information reliable, and justifiably so. When we find a major safety problem in a car which happens rarely we take it very seriously, and do everything we can to alert consumers. We have also done our best to get the government to take appropriate steps. The government's failure to act on the Trooper/SLX and other highly rollover prone vehicles is a serious failure, and a disservice to consumers. We are independent and objective. We stand by our tests, and will continue to alert the public to the safety problem these vehicles pose."

48. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackl [sic] Rollover Hazard," <http:// www.consumer.org/

48. *Anderson v. Liberty Lobby, Inc.*; 477 U.S. 251, 257 (1986).

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(Cont'd) cunhtsa.html> (since ca. July 25, 1997) which state: [Same as press release]	
49. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," <http:// www. prnewswire.com/> at Company News On Call: Consumer Reports/ Consumers Union which stated: [Same as press release]	49. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
50. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in September 1997, when CU published a Column, "Frontlines. Safety Update. Government Won't Investigate Isuzu Trooper," Consumer Reports (Sept. 1997) which stated: "Since 1988 we have	50. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd)

published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . .

". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."

51. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in September 1997, when CU published "Government Won't Investigate Isuzu Trooper," <www.consumerreports.org/Categories/Cars Trucks/

51. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) Reports/9709trop.htm>, Consumer Reports Online (since ca. Sept. 1997), which stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . . ". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
52. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1997, when CU published	52. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) an Article, "How Safe Are SUVs?,: Consumer Reports 60 (Nov. 1997) which stated: "Of the 61 SUVs, minivans, and pickup trucks we've tested in the last nine years, only two SUVs have tipped up so severely that we judged them Not Acceptable: the 1988 Suzuki Samurai and the 1995-96 Isuzu Trooper and its twin, the 1996 Acura SLX."		
53. Suzuki cannot prove its claim for product disparagement.	53. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986); Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7. *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986); *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.ed 547, 572 (1989).	

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54. Suzuki cannot prove its claim for violation of California Business & Professions Code § 17200.	54. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986); Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986).

Dated: May 24, 2000

JUDGE ALICEMARIE H. STOTLER
UNITED STATES DISTRICT COURT

SUBMITTED BY:

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APPENDIX E — WARNING: THE SUZUKI ROLLS OVER TOO EASILY, SECTION: VOL. 53, NO. 7; PG. 424, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, JULY 1988

HIGHLIGHT:

The Jeep Wrangler, the Jeep Cherokee, and the Isuzu Trooper got through our emergency turns. The Suzuki Samurai flunked.

BODY:

"No auto since the VW beetle has created such a sensation. Large real-estate developers, career women, surf bums and college students are having a ball in today's cult car, the Suzuki Samurai. They're painting them pink and dressing them up with chrome wheels, fog lamps and spare tire covers. And they're cruising everywhere with the top down in their four-wheel-drive baby jeeps. . . ." – Marketing & Media Decisions

Early this year a staff member was driving our new Suzuki Samurai slowly, in second gear, along a snow-covered dirt road leading to our auto test track when he felt the tires grab in a rut worn by earlier traffic. The driver turned the wheel to the right to steer clear. The front wheels pulled out of the rut and climbed approximately six inches up a ridge of plowed snow at the side of the road. Then, as the driver tried to straighten the wheels, the Suzuki flopped over on its side.

The driver climbed out uninjured, but with new respect for the laws of physics.

Appendix E

The laws of physics say a vehicle with a high center of gravity is more likely to roll over than a vehicle with a low center of gravity. All four-wheel-drive utility vehicles have a higher center of gravity than passenger cars, a consequence of the extra ground clearance needed when driving on rough terrain rather than a paved road.

The laws of physics say a narrow vehicle with a high center of gravity is more likely to roll over than a wider vehicle with a high center of gravity. The Suzuki Samurai is one of the narrowest vehicles on the road. Its "tread" width – the distance from the center of the left front wheel to the center of the right front wheel – measures only 51.2 inches.

A short narrow vehicle with a high center of gravity is more likely to roll over than a longer narrow vehicle with a high center of gravity. The Suzuki Samurai is also one of the shortest vehicles on the road, only 80 inches between the centers of the front and rear wheels.

Finally, a light vehicle is more likely to tip over than a heavy vehicle, other things being equal. The Suzuki weighs 950 pounds less than the Jeep Wrangler, the small utility vehicle that's closest to it in general configuration. It weighs 1220 pounds less than the Jeep Cherokee and 1590 pounds less than the Isuzu Trooper II, the two larger utility vehicles tested for this report.

Given their physical characteristics, it's not surprising that utility vehicles roll over two to three times more frequently than do passenger cars. Nor is it surprising that the fatality rate among occupants of small utility vehicles is

more than double that of small passenger cars and small pickup trucks, the second most hazardous types of vehicle.

When the Insurance Institute for Highway Safety analyzed auto-accident fatalities in one- to three-year-old cars and trucks for the years 1981 to 1985, it found that occupants of small utility vehicles were being killed at the rate of 5.7 for every 10,000 vehicles registered. For small passenger cars and small pickups, the rate was about 2.4 deaths per 10,000; for large cars, about 1.2 deaths per 10,000.

The Suzuki Samurai was not marketed in the U.S. during the years those accident fatalities were occurring. However, it is rapidly compiling mortality statistics all its own.

The Center for Auto Safety, a nonprofit consumer group, says it has received reports of 20 Suzuki Samurai rollover accidents resulting in 21 injuries and four deaths. It has also received reports of six rollovers in variants of the Samurai, such as the Suzuki SJ410, which is sold in Hawaii and the Virgin Islands; those resulted in seven injuries and one death. The National Highway Traffic Safety Administration has received 44 reports of Samurai rollovers, resulting in 16 deaths.

That's an ominous record of rollovers, considering that there are only 150,000 Samurais on U.S. roads so far, and that many of them have been in use for less than a year.

The physical characteristics of four-wheel-drive utility vehicles, the accident statistics, and our own experience were very much on the minds of our auto testers as they prepared

to run the Suzuki Samurai, the Jeep Wrangler, the Isuzu Trooper II, and the Jeep Cherokee through their paces.

Our regular test program includes a maneuver designed to see how controllable a car remains when a driver is forced to steer sharply – to avoid, say, a child who unexpectedly darted into the road. To simulate that kind of sudden emergency, our drivers run each car through a lane-changing course marked off by traffic cones. One cone blocks the right-hand lane, a stand-in for the obstacle to be avoided. The drivers begin their left turn out of the lane 60 feet before the obstacle. They then must steer sharply enough to get back into the lane no more than 60 feet beyond the obstacle.

Our test drivers take the cars through the course at increasingly higher speeds, noting how fast they can swerve around the obstacle without knocking over cones and without losing control.

The cars get the benefit of the doubt in this test. We run the test on dry pavement with expert drivers who've steered through the course hundreds of times before. The drivers don't brake while steering, as a nonprofessional driver might in an emergency, so the cars aren't forced into premature skids or spins. Nor do they accelerate. This "accident-avoidance maneuver" realistically simulates a situation that could confront any driver any day. We never attempt unrealistic stunts, such as U-turns at high speeds.

Most vehicles weave through the course easily up to about 50 mph, then start hitting cones or skidding at some point above 50 mph. During the 10 years we've used this

test, no vehicle we've tested – and these have included many vans and small trucks with high centers of gravity – has threatened to roll over.

Under the experienced touch of our drivers, all four utility vehicles got through the course at 52 mph or better. The Suzuki Samurai was actually more maneuverable than the others, since it's so much smaller and lighter.

With concern about a potential rollover somewhat allayed, a staff member who does not normally drive the course tried to steer the Suzuki around the obstacle. All went well for several runs at moderate speed. Then, on a run at 45 mph, the driver made a slight steering misjudgment: He turned wider than necessary to clear the obstacle, something many ordinary drivers might do in an emergency turn. That forced him to turn back a bit more sharply than our regular testers had. As he turned the steering wheel to the right to get back into lane, the Suzuki teetered to the left. The two right-side tires lifted about a foot off the pavement before the driver was able to bring the vehicle back under control.

The Suzuki had come within a hair of rolling over at a moderate speed in a maneuver that shouldn't put daylight under the tires of any car. A poor-handling car might skid or spin when turned sharply at these speeds. That's hazardous enough. But a rollover at moderate or high speed would very likely injure or kill the occupants. A rollover in an open vehicle, such as the Suzuki featured in the company's "fun" commercials aimed at young people, is especially deadly.

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Would the other utility vehicles show similar instability if steered the way the Suzuki had been steered?

To find out, we put all the vehicles through a slightly different maneuver. We realigned the cones so that our test drivers had to start the turn 50 feet from the obstacle instead of 60 feet from it. That meant they needed to steer around the obstacle and back into lane in a total of 110 feet rather than the usual 120 feet. We also moved the obstacle three feet farther to the left.

As a result of those changes, our drivers would have to sharpen their turns a little.

For this test, we equipped the two small vehicles, the Suzuki Samurai and the Jeep Wrangler, with the outriggers shown in the photos. If one of them tipped during the test, the outriggers would contact the road first and keep the vehicle from landing on its side. (The outriggers also added about 300 pounds, making the Suzuki and the Jeep Wrangler somewhat harder to roll than they normally would be.)

In this more demanding test, the Isuzu Trooper, the Jeep Wrangler, and the Jeep Cherokee began knocking over cones at about 40 mph. But they remained stable. We also tried the Jeep Wrangler without the outriggers. Still stable.

The Suzuki Samurai, by contrast, toppled onto the outriggers when turned through the course at about 40 mph. Without the outriggers, it would have rolled over.

During the period we were testing these vehicles, Suzuki introduced a modified version of the Samurai, a "1988 1/2"

model with a softened suspension. We acquired the latest version and ran it through the same accident-avoidance maneuver. It proved even less stable than the Samurai we originally tested. The front right wheel lifted in turns at low speed. And the vehicle rolled onto the outriggers at 38 mph.

In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable.

A rollover in a Suzuki Samurai would be even more dangerous than a rollover in a passenger car. Utility vehicles such as the Suzuki are not required to meet Federal safety standards for side-impact and rollover protection, which cover only passenger cars. Although widely advertised, sold, and used as a passenger car – indeed, as a car in which "to have a ball," as the advertising trade press puts it – the Suzuki we tested has no rollbar to reinforce its hardtop, as the Jeep Wrangler does.

Soon after our tests were complete, we called the results to the attention of the National Highway Traffic Safety Administration, in an effort to warn those who might have been considering a Suzuki before this issue of CONSUMER REPORTS came out. We have also petitioned NHTSA to establish minimum stability standards for all vehicles, so that cars and trucks as tippy as the Suzuki Samurai can no longer be sold here.

Unfortunately, NHTSA, a reluctant watchdog, has already denied a similar petition filed last year by

Sen. Timothy Wirth (D., Colo.). Senator Wirth based his petition on the fatality record of past vehicles whose physical characteristics indicated potential instability; we base ours on test results.

Senator Wirth also asked for a defect investigation and possible recall of vehicles with a potential to roll. In April, NHTSA denied that petition as well, saying such an investigation would be costly and time-consuming. Instead, it plans to issue a pamphlet on the safe use of utility vehicles.

But if reading material is the answer, Suzuki and other manufacturers already provide it. The cars all carry warning stickers mandated by law. Suzuki's sticker, attached to the inside of the driver's door, reads as follows:

Warning: "This is a multi-purpose vehicle which will handle and maneuver differently from an ordinary passenger car, in driving conditions which may occur on streets and highways and off-road. As with other vehicles of this type, if you make sharp turns or abrupt maneuvers, the vehicle may rollover or may go out of control and crash. You should read driving guidelines and instructions in the owner's manual, and WEAR YOUR SEATBELTS AT ALL TIMES."

Such stickers may help Suzuki defend against the liability suits that are already coming its way. But the Government agency responsible for auto safety should not be content with stickers or with some pamphlet as a substitute for safe design. It's doubtful that those youngsters shown tooling down to the local soda fountain in one of Suzuki's commercials will take the time to read a label or a pamphlet when they confront their first sudden turn.

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The Center for Auto Safety has filed a more specific petition, asking for a defect investigation and recall of all Suzuki Samurais. We support that petition. Unfortunately, the Samurai is not hazardous as a result of a defect that can be fixed. The design itself is hazardous, combining a high center of gravity with a narrow tread width, a short wheel base, and light weight. A true consumer-protection agency would require Suzuki to buy its product back from the consumers it has put at risk.

Unlike the Suzuki, the other three utility vehicles purchased for this report are not unreasonably hazardous. The bigger ones, the Jeep Cherokee and the Izuzu Trooper II, are the equivalent of mid-sized passenger cars. We equipped them the way the typical buyer would, with automatic transmission, power steering, air-conditioning, and other common options. We chose the optional six-cylinder engine for the Cherokee, since the vast majority of them are sold that way. A Six isn't available for the 1988 Trooper II; a larger fuel-injected Four is new to the Trooper this year, as is an automatic transmission. So equipped, the Cherokee's list price topped $18,000; the Trooper II reached nearly $16,000.

The Jeep Wrangler, like the Suzuki, is a runabout that appeals to a younger, more adventuresome buyer. To keep the price down, we chose a basic model with few options. Our Wrangler had the standard four-cylinder engine and five-speed manual transmission. We opted for the hard top with full doors rather than the convertible. But even modestly outfitted, it listed for over $12,000. A comparably equipped Samurai lists for about $10,000.

Appendix E

Part-time four-wheel drive (you can shift in and out of the four-wheel-drive mode) is standard in all these vehicles. Four-wheel drive is intended for use in snow, ice, or mud, or when driving off road. All the vehicles have an additional Low range in four-wheel drive, so they can be driven slowly over demanding terrain and yet retain sufficient power to climb steep grades.

As we've noted above, "sport/utility" vehicles such as these need not conform to a number of important safety regulations that apply to passenger cars. They are exempt not only from regulations that specify the crush-resistance of the roof and resistance to side impacts but from those that require head restraints for front-seat occupants, eye-level brake lights, and automatic safety-belt systems. Nor need they conform to any standards for bumper protection. We did not perform our bumper tests with these vehicles. Because their bumpers are higher than those on passenger cars, our bumper basher would pass under them, just as a passenger car's bumper would. Our examination indicated, however, that the bumpers and the vehicles' adjacent body structure would probably be damaged severely in a 5-mph collision.

Jeep Cherokee

Tested car. Four-door, four-wheel drive, $13,150 list. Standard equipment includes 2.5-liter Four, four-speed manual transmission, Command-Trac part-time 4WD system, power brakes, and tinted glass. Major options in our car: 4-liter fuel-injected Six, automatic over-drive transmission, air-conditioning, power steering, tilt steering column, console with armrest, roof rack, and Pioneer package (including stereo

radio, gauge package, rear-window wiper/washer, and upgraded interior trim). List price, as equipped: $ 18,070, including destination charge.

Other styles. Four-wheel drive: Two-door, $ 12,538; Sport, $ 13,727; Limited, $ 22,260. Four-door Limited, $23,153. Two-wheel drive: Two-door, $ 11,186; Sport, $12,265. Four-door, $ 11,798.

Engine and transmission

Starting/running. Excellent. Flawless under all conditions.

Acceleration. Excellent. Strong.

Transmission. Very Good. Occasional abrupt downshifts. The transmission can be set for Power or Comfort to adjust shifting to suit driving conditions. We found the difference in behavior too subtle to be of use. The Command-Trac four-wheel-drive-system can be engaged at any time simply by pulling a lever; the front hubs lock automatically.

Economy. Fair. The Cherokee's relatively large size and big engine took a toll on fuel mileage. Expect around 18 mpg, overall, in two-wheel drive.

Handling and braking

Routine handling. Good. Not up to that of most two-wheel-drive family wagons or sedans. The Cherokee responded quickly, but its power steering felt vague. In turns,

the vehicle often stepped to one side when its wheels encountered bumpy or broken pavement.

Emergency handling. Good. Predictable, but sluggish and vague in abrupt avoidance maneuvers. Steady, but a bit sloppy and numb-feeling in hard turns at the track.

Braking. Very Good. Because the front brakes locked early, controlled stopping distances were somewhat long. The parking brake is conveniently located between the front seats.

Ride and noise

Ride. Fair. On all but smooth main roads, the Cherokee subjected riders to abrupt pitching and unusually large rocking motions. The worse the road, the greater the discomfort. The ride was only slightly worse with a full load.

Noise. Fair. On the highway, wind and road noise were louder than in an equivalent passenger car.

Seating accommodations

Driving position. Good. The driver's seat is too low. No matter how we fiddled with the "rocking chair" adjustment (a unique Renault design), we were unable to find a comfortable driving position. The steering wheel is too close to the driver; the tilt steering column ($124) didn't help. The accelerator is too far left, and all the pedals are too close to a tall driver.

Appendix E

Front seating. Good. Bucket seats from the Renault Alliance seem inappropriate here. Contours and upholstery friction offer some side support, but there's insufficient thigh and lower-back support. The seatback-angle lever was difficult to operate. These seats are a $59 option with the Pioneer and Chief packages and $134 extra in the base model.

Rear seating. Fair. The bench seat is about as welcoming as a park bench: It's hard and flat. There's enough knee room and head room in back for six-foot-tall riders. Three average-sized men can ride in back, but not in comfort. The seat doesn't extend the full width of the vehicle, and hard plastic trim at the base of the roof pillars jabs outboard occupants. There's stiff competition for foot space.

Climate control

Heating. Very Good. Slow to warm but eventually torrid. Spotty warm-air distribution. The fan was noisy. Ducts deliver warm air to rear-seat occupants. Bilevel failed to provide warm air below, cooler air above. Competent defrosting. The rear-window washer/wiper ($144) was very useful in sloppy weather; the rear defroster ($158) is a necessity in most climes. Our car lacked the latter, and it was sorely missed.

Ventilation. Excellent. Ample. Air can be fan forced and warmed as needed.

Air-conditioning. Excellent. The integrated unit in this model ($820) has manual controls but operates automatically in Defrost and Bilevel above about 30 degrees F to help keep the inside of the windows fog-free on cool, damp days.

Appendix E

Convenience

Controls. Excellent. Old-fashioned looking but functional. There's no flash feature that enables the headlights to be used as a "silent horn" in the daytime. The egg-shaped switch for the heater fan is awkward to position. There are several convenient bins and trays in the center console.

Displays. Excellent. Clearly labeled and well lit at night. We could do with less glitter and chrome.

Cargo area. Excellent. Versatile and convenient. The rear seat can be folded down easily to increase cargo capacity. The liftgate raises up out of the way for convenient loading. In all but the basic model, the cargo area is nicely finished with carpeting and sidewall trim. The compact, limited-service spare tire mounts upright behind the left rear wheel housing, where it's out of the way yet accessible. A conventional spare ($58) fits in the same location.

The Cherokee can tow 5000 pounds if it's equipped with towing package B ($237) and with a six-cylinder engine, automatic transmission, heavy-duty cooling system, and other equipment.

Servicing. Good. The heavy hood is a challenge to prop up, and some routinely serviced items are awkward to check. The brake-fluid reservoir is opaque, so its cover must be removed to see the level. Chrysler has upgraded the powertrain warranty to three years or 36,000-miles. The basic warranty remains one year or 12,000 miles; rust-through, three years with unlimited mileage.

Appendix E

Safety and reliability

Safety. Comfortable front belts provide moderate tension on the riders' shoulder and a snug fit at the hips (or around a child safety seat). There are no shoulder belts in the rear seat. All three lap belts can secure a child safety seat. Tether anchors are provided. The rear doors do not have child-proof locks.

Although not required by safety standards, there are front-seat head restraints in the Cherokee, and they're amply tall even when fully lowered. Driver view is quite good, especially when compared with that of most passenger cars. The fuel tank is close to the rear bumper, a much more vulnerable location than that used in passenger cars.

The Government has not crash-tested a Jeep Cherokee recently, and there are no plans to do so this year.

Reliability. Poor. Since its introduction in 1984, the Cherokee has compiled a much-worse-than-average record.

A whopping 17 sample defects ranged from a troublesome shift linkage adjustment that made key extraction difficult to a skimpy paint job. Others: a clunk in the driveline whenever we stepped off and back on the throttle, a clock that quit working, poor radio reception, and on and on.

Appendix E

Isuzu Trooper II

Tested car. Four-door XS, $13,439 list. Standard equipment includes 2.6-liter, fuel-injected Four, five-speed manual transmission, part-time 4WD, power steering, power brakes, underbody skid plates, full gauges, aluminum wheels, rear-window defroster and wiper/washer, and stereo radio. Major options in our car: automatic overdrive transmission, air-conditioning, and roof rack. List price as equipped: $15,790, including destination charge.

Other styles. Two-door S, $11,909; XS, $12,909. Four-door S, $12,639; LS, $14,799.

Engine and transmission

Starting/running. Excellent. Unfailing.

Acceleration. Very Good. Adequate most of the time, but a bit sluggish when the vehicle was loaded with people or cargo.

Transmission. Very Good. Generally smooth shifting, but indecisive when trying to maintain speed on hills. The Normal and Power settings used to change the shifting characteristics according to driving conditions were more effective than those in the Cherokee. To use four-wheel drive, you must lock the front hubs manually before getting into the car, by twisting a knob at the center of each wheel - not a pleasant task in nasty weather. (Troopers equipped with a manual transmission have automatic-locking hubs.)

Appendix E

Economy. Fair. Comparable to the Cherokee, but with a much lower level of performance. Expect to average about 19 mpg in two-wheel drive.

Handling and braking

Routine handling. Good. Generally competent, but when the Trooper rocked over bumpy rural roads it sometimes veered slightly off course. Cross winds moved the vehicle around quite a bit. With a full load aboard, the vehicle yawed disconcertingly when we changed lanes quickly on expressways.

Emergency handling. Fair. Unsteady in emergency maneuvers. In abrupt maneuvers, the Trooper leaned so sharply that its suspension bottomed on the outside of the turn. When that happened, the vehicle skated out a bit before the front wheels grabbed and brought the vehicle back into the turn. The sensation was unnerving, but our drivers controlled the Trooper safely through the pylon course – albeit at a lower speed than the others.

Brakes. Excellent. Remarkably short stops for such an ungainly vehicle. But the brakes were touchy, so it was a challenge to control the severity of those stops. The parking brake, a cane-handled stick, pulls out from under the dash.

Ride and noise

Ride. Fair. Somewhat harsh and jittery on expressways. A rough rider, with sharp bounding and tossing, on average secondary roads. Painful on rougher back roads. A full load

made the motions larger, more abrupt, and mostly uncontrolled.

Noise. Fair. About the same as the Cherokee, with significant wind and road noise.

Seating accommodations

Driving position. Very Good. The driver's seat has a height adjustment, so just about all drivers were able to sit quite comfortably, with an excellent view out. Tall drivers may find the pedals too close and the accelerator too vertical. When our shortest driver moved the seat fully forward, it interfered with cranking the window.

Front seating. Very Good. High, firm seats – a bit too firm for some. The seatbacks are adjustable, but the recliner levers are hard to find and operate. Upholstery is cloth and vinyl. Access is easy for tall individuals, a hike for shorter people.

Rear seating. Good. Roomy for two, cramped for three. The firm, flat seat makes no concessions to the human anatomy.

Climate control

Heating. Fair. Almost impossible to regulate. Heat was either off or on: None or too much. Distribution was uneven. There are no ducts to direct heat to the rear. (A rear-seat heater is $300 extra.) The Bilevel setting, which runs the air-conditioner, gave temperature stratification to an extreme,

often spewing icy air from the dash vents, scorching air from the floor registers. A rear-window wiper/washer and defogger are standard in the XS and LS, $ 200 additional in the S.

Ventilation. Excellent. Ample. Fresh air can be fan forced, heated, or both, as needed.

Air-conditioning. Excellent. The $ 850 integrated air-conditioner operates automatically in Defrost to help keep the windows free of fog during cool, damp weather.

Convenience

Controls. Very Good. Essentially functional. Small complaints: The headlight switch is too close under the steering wheel; the wiper switch (on the turn-signal lever) turns opposite to convention; and the radio is mounted low and is difficult to tune. There are several convenient bins, cubbies, and door pockets to stow small items.

Displays. Very Good. The oil-pressure, fuel, and engine-temperature gauges are in the center of the dashboard, away from the driver's direct line of sight. Reflections make them hard to read in the daytime.

Cargo area. Excellent. Roomy and exceptionally accessible. The rear opening consists of two doors, a large one on the left, on which the full-service spare tire is mounted, that opens and closes like any car door, and a smaller one on the right that's held closed by a small catch at the bottom. The area is nicely finished, but small cubbies or

bins would be a welcome addition. Folding down the rear seat to expand the cargo area is an awkward job, but worth the effort.

Trailer-towing capacity is 2000 pounds.

Servicing. Very Good. Fairly handy, but access to the engine coolant drain is limited, and the engine-oil and transmission-fluid dipsticks are similar looking and very close to one another. Warranties: basic, one year or 12,000 miles; powertrain, two years or 24,000 miles; rust-through, three years with unlimited mileage.

Safety and reliability

Safety. The front safety belts are easy to put on and comfortable. The outboard rear seats have lap-and-shoulder belts. The shoulder belts require a locking clip for a child safety seat. The center lap belt works as is. The rear doors and the cargo door have child-safe locks. The transmission shifter isn't interlocked with the ignition key: If you fail to shift into park or set the parking brake, the vehicle could roll away.

The front-seat head restraints are amply tall. Driver view to the rear is marred by the spare tire on the left rear cargo door and the bar between the rear door windows. The fuel tank is close to the rear bumper, but is protected by a steel plate.

A 1985 Trooper II didn't perform well in the Government's crash tests. Injuries to the driver dummy were severe; to the passenger, fatal.

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Reliability. Good. Data for the 1985 and 1986 model years indicate an average record.

Several sample defects were serious, and three were potentially crippling. The spark plugs were finger tight. Engine oil dripped from the loose oil filter. Water entered the steering column past a defective seal, so the steering bound up with ice on winter mornings. The bolts attaching the rear seat to the floor were loose.

Jeep Wrangler

Tested car. Two-door convertible, $ 10,595 list. Standard equipment includes 2.5-liter, fuel-injected Four, five-speed manual transmission, Command-Trac part-time 4WD, power brakes, full gauges, and tinted windshield. Major options in our car: hard top with full doors, power steering; conventional spare tire, extra-capacity fuel tank, and stereo radio. List price, as equipped: $12,263, including destination charge.

Other styles. Two-door convertible S, $8995; Sahara, $11,995; Laredo, $13,395.

Engine and transmission

Starting/running. Excellent. The engine cranked slowly, but it always started and ran well.

Acceleration. Good. Just adequate. The engine was extremely noisy and harsh during acceleration. The optional 4.2-liter Six ($386) has about the same horsepower as the Four, but considerably more pulling power.

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Transmission. Good. Stiff shifting when cold. Fifth gear delivered weak response on the highway. The Wrangler can be shifted into four-wheel drive at the tug of a lever when driving at any legal speed; the front hubs lock and unlock automatically.

Economy. Fair. No better than the larger, heavier vehicles with their automatic transmissions. Expect to average about 19 mpg in two-wheel drive.

Handling and braking

Routine handling. Fair. Oddly sensitive power steering, combining abrupt response (often more than we wanted or intended) with virtually no road feel. The Wrangler stayed very level in turns, but it was quite vulnerable to wind on the highway. On bumpy back roads the stiff suspension caused many small, quick rocking motions that made the vehicle feel as though it were darting from side to side.

Emergency handling. Fair. Tricky. Our drivers said unskilled drivers could find the Wrangler difficult to handle in an emergency. But in all our tests, the vehicle stayed level. It showed no tendency to lift two wheels or roll over. It did fishtail rather easily. The overly sensitive power steering noted in normal handling was less of a problem in hard turns at the test track.

Braking. Good. Unimpressive. It wasn't easy to control the severity of stops and, in many, the vehicle weaved from side to side. The foot-operated parking brake is unsuitable with the manual transmission.

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Ride and noise

Ride. Poor. Ride comfort ranged from annoying on the smoothest roads to punishing on rough roads. The Wrangler can snap and jerk occupants painfully – at times with eye-blurring speed. A full load did not affect the ride.

Noise. Poor. A half-hour ride on the highway, with ceaseless road, wind, and engine noise, was an exhausting safari. The Wrangler's bare fiberglass top and bare metal rear floor amplified the noise.

Seating accommodations

Driving position. Fair. The seat is low and the steering wheel high. The pedals are crowded to the left. Some drivers stepped on the brake when intending to depress the clutch. While tall drivers found the pedals too close to the seat, our shortest driver had to stretch to depress the clutch. The parking brake is squeezed between the clutch and the door. It's awkwardly high, too.

Front seating. Good. The individual seats provided little support, and the rigidly straight seatbacks aren't adjustable. The textured vinyl upholstery is unpleasantly sticky, especially in warm weather. The exceptionally high, channel-shaped doorsills tripped just about everyone entering and leaving the car, and there are no door checks.

Rear seating. Poor. The tiny bench barely accommodates two average-sized men, and it makes no pretenses about providing support. It feels as flat as it looks. Tall riders had

plenty of head room but insufficient knee room. Feet became entangled and shoes scarred by the sharp linkages under the front seats. Rear riders are captives of those in front: The levers that enable the front seats to be moved for exiting passengers are inaccessible from the rear seat.

Climate control

Heating. Good. The heater provided enough warmth, but slowly (especially in freezing weather) and unevenly. There's no Bilevel setting. Windshield defrosting was satisfactory, but there are no side-window defrosters. A timed-cycle rear-window defroster is $161 extra on the hardtop. A rear-window washer/wiper is not available, although sorely needed to clear road grime that quickly accumulates in sloppy weather.

Ventilation. Poor. A little fresh air wafts in only when the car is moving. It can't be heated.

Air-conditioning. Not tested. Not available with the four-cylinder engine; $861 with the Six. It isn't integrated with the climate-control system. It can only recirculate cabin air.

Convenience

Controls. Good. The instrument panel looks as though the controls were thrown at it and mounted wherever they stuck. The headlight rocker switch is low, recessed, and difficult to see and reach. The panel-light dimmer is obscure. The headlights can't be flashed as a daytime "silent horn." The climate controls are low-mounted and stiff. The radio is far from the driver.

Displays. Fair. Gauges are stretched across the dashboard, some so far away they're hard to see. Daytime reflections and weak lighting at night don't help.

Cargo area. Good. Minimal in size and finish. There's room for little more than a small suitcase behind the rear seat. The rear seat folds (but not easily) to expand capacity. There's nothing to secure the seat in its folded position so it falls backward when the vehicle begins moving. Luggage rattles around on painted metal: There's no carpeting, no plastic trim. The lower door opens like a conventional car door; the upper windowed door opens like a hatch lid. Both are well out of the way for easy loading. The limited-service spare tire mounts on the outside of the lower door. A full-service spare is $109.

Trailer-towing capacity is 2000 pounds.

Servicing. Good. Except for the opaque brake-fluid reservoir in the engine compartment, all is pretty straightforward. Getting into the engine compartment is not: two stubborn external latches must be pulled and the safety catch released before the hood can be propped open. Warranties: basic, one year or 12,000 miles; powertrain, three years or 36,000 miles; rust-through, three years with unlimited mileage.

Safety and reliability

Safety. The front safety belts are comfortable to wear, if a bit inconvenient to reach. The rear seat has lap belts only.

They're awkward to put on and, since they're always falling on the floor, they can be difficult to find. Both rear belts will secure a child seat.

The high, bulbous hood and the rear-mounted spare tire interfere with the driver's view. The windshield wipers park at a 45-degree angle, a distraction. The front seats' integral head restraints are adequately tall. The fuel tank is just forward of the rear end, but has a steel plate protecting it. All Wranglers have a braced steel roll-over bar inside the cabin. It is not mounted directly to the frame; we can't say whether it's adequate or not.

In Government crash tests of a 1987 Wrangler, injury to the driver dummy was moderate; to the passenger, severe or fatal.

Reliability. No data; new model. Other Jeeps have had a generally poor record.

Just three sample defects. The front wheels were out of alignment. And there were a few exterior finish and interior trim flaws.

Suzuki Samurai

Tested car. 1988 Two-door hardtop Deluxe I, $8995 list. Standard equipment includes 1.3-liter Four, five-speed manual transmission, part-time 4WD, power brakes, rear-window defroster, cloth interior and carpet, and stereo radio. Major options in our car: none. List price, as equipped: $9235, including destination charge.

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Other styles. Two-door convertible Standard, $ 7995; Deluxe I, $8695; Deluxe II, $8945. Two-door hardtop Standard, $8905; Deluxe II, $8995. 1988 1/2 models are priced as follows: Two-door convertible Standard, $ 8495; Deluxe, $9195. Two-door hardtop Standard, $ 8595; Deluxe, $9495.

Engine and transmission

Starting/running. Good. Often stalled after being started and while warming up. The engine sagged and hesitated even when fully warm.

Acceleration. Fair. Weak. More noise than power.

Transmission. Good. Lots of shifting was required to maintain speed on uphill surfaces. The front wheel hubs must be manually locked to use four-wheel drive.

Economy. Very Good. Respectable, but with a marginal level of performance. Expect about 28 mpg overall in two-wheel driving. The 1988 1/2 Samurai has a different fifth gear ratio that provides more response.

Handling and braking

Routine handling. Poor. Sluggish, heavy, and vague. The Samurai didn't track well. We noticed disconcerting wandering in the wake of passing trucks and in crosswinds. Sharp bumps made the steering wheel kick in the driver's hands. On occasion, the vibration was so severe that the front wheels skittered to the side.

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Emergency handling. Not acceptable.

Braking. Excellent. Very short stops.

Ride and noise

Ride. Poor. We cannot recall testing a vehicle that rode as poorly. There were unrelenting small, choppy pitches, even on smooth expressways. As roads worsened, the ride became painful. Fully loaded, the car was just as bad. The 1988 1/2 model has softer front springs that provided a less sharp but more bouncy ride.

Noise. Poor. Too noisy. Highway travelling brought on a discordant din of wind, engine, and road noise.

Seating accommodations

Driving position. Fair. Tall drivers found the pedals too close to the seat and the accelerator too far left. Most drivers found the steering wheel too high; some found the seat too low.

Front seating. Fair. The firm individual seats were shy on thigh and lower-back support, especially for tall occupants. Adjustable seatbacks. Cloth upholstery. You have to hold the doors open as you climb in and out of the vehicle; there are no door checks.

Rear seating. Poor. Passengers must perch on a tiny bench and place their feet atop a high and broad floor pan. There are no foot wells.

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Climate control

Heating. Fair. Two choices: hot or cold. Temperature was nearly impossible to modulate and distribution was spotty. Output was adequate down to about 10 degrees F. A crude Bilevel setting gives ambient air above and hot air below. Defrosting was satisfactory, but the rear defroster (standard on the Deluxe I and II hardtops, not available on the Standard) worked slowly.

Ventilation. Good. The noisy fan forces enough fresh air. The temperature can't be adjusted.

Air-conditioning. Not tested. Standard on the Deluxe II. The air-conditioner, which can be activated in any mode by pressing a button, delivers only recirculated cabin air.

Convenience

Controls. Good. They're in hiding: the climate controls, behind the windshield wiper lever and the steering wheel; the rear defroster switch, behind the steering wheel; the hood release, buried in the glove compartment. The radio controls aren't hidden, but there's no light to illuminate them at night. The turn-signal lever has a very weak lane-change detent.

Displays. Very Good. The instruments have only fair contrast. Reflections are a problem in the daytime.

Cargo area. Fair. Very small, but easily expandable. The single rear door, which opens wide and out of the way, and the low sill make loading easy. The floor is flat and

carpeted, but sharp edges on the folded rear seat could damage luggage. The full-service spare tire mounts conveniently on the outside of the rear door.

Trailer-towing is limited to 1000 pounds.

Servicing. Excellent. Straightforward. Warranties: basic, one year or 12,000 miles; powertrain, 2 years or 24,000 miles; rust perforation, three years with unlimited mileage. The hood on the Wrangler and Samurai can be opened 90 degrees for improved service access.

Safety and reliability

Safety. The front safety belts are comfortable and easy to put on, but they often get caught in the door when they are unbuckled. Both rear lap belts can secure a child safety seat; the front passenger belt requires a locking clip.

Driver view is good except for the wide center pillar. The front-seat head restraints are adequately tall. The fuel tank is in a vulnerable location in the rear, but it does have a steel plate. The hardtop Samurai lacks a roll bar; the open version has one, but we can't attest to its strength.

In Government crash tests, the driver dummy in a 1986 Samurai received possibly severe injuries; the passenger fared somewhat better. In the test, the right-rear portion of the hood came through the windshield a small distance.

Reliability. No data, new model.

Our Samurai exhibited six defects attributable to sloppy assembly or incomplete dealer preparation. The front wheels were misaligned and out of balance. The outside mirrors would not hold their adjustment. The tires were overinflated. Finish flaws, which we tally as just one defect, were legion.

RECOMMENDATIONS

The Jeep Cherokee and the Isuzu Trooper II are designed to function as family-sized passenger cars as well as go-anywhere four-wheel-drive vehicles. Of the two, the Cherokee feels a bit more like an ordinary station wagon. Its four-wheel-drive system works simply and easily. It is, however, more expensive than the Trooper and, according to owners surveyed, likely to be more troublesome.

The Trooper is larger, taller, and more trucklike in feel, and it can carry more than the Cherokee. If you must have an automatic transmission, prepare to deal with the inconvenience of manually locking the Trooper's front wheel hubs whenever you want to shift into four-wheel drive. We think that's a great disadvantage, but avoidable if you purchase a Trooper with a manual transmission.

Other competing vehicles in this class include the Chevrolet S-10 Blazer and the Ford Bronco II (last tested in 1984). Neither is available in a four-door version, a serious omission in this family-wagon class. And neither offers the passenger accommodations or cargo volume of the Trooper, or is likely to be as reliable.

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The Jeep Wrangler is in another class entirely. It doesn't pretend to be a comfortable people-mover or a capable cargo-carrier. In the basic model we tested, it's a crude vehicle, very noisy and hard-riding. But it does what it is supposed to do as a simple on-and-off-road utility vehicle. Its handling is well below that of the average passenger car. We believe it could be a handful for the average driver, particularly in emergency maneuvers. The Wrangler's repair record is likely to be worse than average.

The Suzuki Samurai, of course, is all the craze in small jeeplike vehicles. In our opinion, its behavior in emergency maneuvers, is all a rational buyer needs to know about this car. But we found it wretched in most other respects as well.

APPENDIX F — FOLLOW UP: SOME SUZUKI ROLLOVERS, SECTION: VOL. 53, NO. 8; PG. 487, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, AUGUST, 1988

HIGHLIGHT:

New accident statistics and reader reports underline the vehicle's hazard.

BODY:

Last month, we rated the Suzuki Samurai Not Acceptable because we found it dangerously prone to roll over when turned sharply to steer around an obstacle - a child who runs into the road, for example, or another car backing out of a driveway. Such a situation confronted 25-year-old Jacquelyn Kay Langworthy on June 9, 1987, while she was driving her Suzuki Samurai to work on 18 Mile Road in Gowen, Mich. According to the police accident report, Langworthy was driving in a 55-mph zone when she swerved to the right to avoid an oncoming car. The Samurai rolled over at least twice, landing 200 feet down the road in a ditch. Langworthy was killed.

The National Highway Traffic Safety Administration (NHTSA) keeps a variety of records of traffic accidents, fatalities, and injuries reported by police and reported directly through its Office of Defects Investigation's auto-safety hotline. As of late June, the Office of Defects Investigation had tallied 67 rollover accidents for the Suzuki Samurai and the Suzuki SJ410, a similar utility vehicle sold abroad and in Hawaii and the Virgin Islands. Those have resulted in 20 deaths and 87 injuries.

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Not all accidents are reported, of course. Most accidents include only property damage, and in some cases, drivers deliberately withhold accident data. For example, 24-year-old David Watson was driving his Suzuki Samurai on Interstate 64 in Memphis, Tenn., he told us, when a truck merged onto the highway, forcing him to shift lanes at about 40 mph. The Samurai went out of control, rolled over, and landed on the passenger side. Watson wasn't injured, so he and his brother-in-law set the car upright and drove away. He didn't report the accident to police or to his insurance company because he didn't want his insurance rates to go up.

At least one set of NHTSA data reflects a significant rollover problem with the Suzuki Samurai. NHTSA's Crash Avoidance Research Data file, a database of all police records filed in six states, shows that in 1986 the Suzuki Samurai rolled over in 64 percent of all single-vehicle Samurai accidents reported in four of those states. This Samurai rollover rate is higher than the rollover rate for the notorious Jeep CJ-5 and CJ-7, two vehicles similar in design to the Samurai, though larger and heavier. The Jeep CJ-5 rolled in 49 percent of its single-vehicle accidents; the Jeep CJ-7, which is 10 inches longer, rolled in 36 percent of its single-vehicle accidents. Some 449 people were killed in accidents involving those Jeeps between 1971 and 1981, according to NHTSA.

Production of the Jeep CJ was discontinued in 1986, when the wider, heavier Jeep Wrangler was introduced. NHTSA has not yet calculated similar rollover statistics for the Wrangler. In our tests, the Wrangler passed the accident-avoidance maneuver's that caused the Samurai to roll, as did the Jeep Cherokee and the Isuzu Trooper II. After our tests were

performed, Consumers' Association of the United Kingdom put the Suzuki Samurai, the Suzuki SJ410, the Toyota Space Cruiser, and the Subaru Justy through identical accident-avoidance maneuvers. The two Suzukis rolled over onto the outriggers added to protect the drivers. The Toyota and Subaru did not.

We find the test results and the statistics compelling evidence that the Suzuki Samurai is an unreasonably hazardous vehicle. The accidents described to us by readers over the past month only underline the hazard.

On July 28, 1987, 18-year-old Kevin Dineen and two friends drove to Long Beach Island, N.J., to play miniature golf. On the way home at about 12:30 A.M., Dineen was exiting the Garden State Parkway in Toms River, N.J., when his Samurai went out of control. The vehicle rolled over several times and landed on the driver's side. Dineen suffered a fractured skull.

On the clear, dry afternoon of July 20, 1987, 19-year-old Ann Marie Ayers was driving at 55 mph on the Long Beach Freeway in Los Angeles when another car cut in front on her. She braked and turned to the left to avoid a collision. Without running off the road or hitting a curb, the Suzuki rolled over. Ayer's arm was pinned and dragged under the car as it slid across 30 feet of pavement. Ayers lost the use of her arm.

On June 15, 1985, 26-year-old William Potter was driving on a two-lane roadway in St. Croix, Virgin Islands. Potter was taking a right turn at about 35 mph when his

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Suzuki SJ410 rolled over and crashed into a wire fence. Potter lost the use of his arms and legs. His lawsuit against Suzuki was settled the night before the trial for "a substantial amount," according to his attorney.

If you have been in an accident involving a Suzuki Samurai, or any other utility vehicle, you should report the case to the following agencies whether or not a police report was filed: Jon White Office of Defects Investigation 400 7th Street, S.W. Washington, D.C. 20590 202 366-4933 Auto Safety Hotline 800 424-9393 outside Washington, D.C. 202 366-0123 in Washington, D.C. Sam Cole Center for Auto Safety 2001 S Street, N.W. Suite 410 Washington, D.C. 20009 202 328-7700

APPENDIX G — GOVERNMENT TO START WORK ON ROLLOVER STANDARD, SECTION: VOL. 53, NO. 11; PG. 702, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, NOVEMBER, 1988

HIGHLIGHT:

But will it ever finish?

BODY:

In response to a petition filed in June by Consumers Union, the National Highway Traffic Safety Administration has begun proceedings "to establish a minimum standard to protect against unreasonable risk of rollover" in a car, van, light truck, or multipurpose passenger vehicle such as the Suzuki Samurai. Consumers Union filed its petition after the Suzuki failed to perform our emergency-avoidance maneuvers at highway speeds without rolling over onto outriggers installed to protect the test drivers (see CONSUMER REPORTS, July 1988).

NHTSA's action, however, does not hold out the promise of protection from this unreasonable hazard anytime soon - perhaps not at all. "The granting of this petition does not necessarily mean that a rule will be issued," NHTSA noted. Even if a rule is eventually issued, the various proceedings leading up to it could take four years or more.

Meanwhile, drivers and passengers in Suzuki Samurais and other vehicles that roll over too easily will continue to run an unreasonable risk of injury and death. At the same time that NHTSA granted CU's petition, it denied a petition

from the Center for Auto Safety asking NHTSA to conduct a defect investigation into the Suzuki's rollover propensity. Such an investigation might have led to the vehicle's recall.

In denying that petition, NHTSA asserted that "the rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles."

According to NHTSA's own Crash Avoidance Research Data file, however, the Suzuki Samurai's rate of rollover in single-vehicle accidents is more than double the average for all sport-utility vehicles. In 1986, the most recent year for which there are figures, the Suzuki rolled over in 64 percent of all single-vehicle Suzuki accidents recorded in this data base. The only vehicle that came close to the Samurai in rollover involvement is the now-discontinued Jeep CJ-5 (49 percent). By contrast, the rollover rate for full-sized sedans was only 8 percent.

NHTSA appears to have relied not on its statistics on rollover rates for single-vehicle accidents but on a different data base, one that includes only rollovers involving a fatality. Elsewhere in its letter denying the Center's petition, it notes that the Samurai was involved in six fatal rollovers per 100,000 vehicles on the road, a record the agency compares favorably with that of the Ford Bronco II - 19 fatal rollovers per 100,000 vehicles on the road.

CU has learned that the overall rollover rate for the Bronco II is high - about the same as that for the Jeep CJ-5 - but not nearly as high as the Suzuki's. The higher number of fatalities in Bronco II rollovers could come about for a

number of reasons. The Suzuki rolled over at a relatively low speed in our accident-avoidance tests; if Bronco II rollovers occurred at higher speeds, one would expect more fatalities per rollover. One would also expect more fatalities if the Bronco II were driven more miles, on average, than the Suzuki.

No matter how you look at the statistics, however, it seems peculiar to argue that the Suzuki should not be investigated because it is no more hazardous than the Bronco II. One would expect an agency concerned with safety to notice that the Bronco II may be at least as hazardous as the Suzuki, and to investigate the rollover propensity of both vehicles.

NHTSA did no independent testing of the Suzuki's rollover propensity. Rather, it uncritically accepted Suzuki's data, saying Suzuki's "demonstrated that the Samurai satisfactorily completed industry accepted . . . tests which might be used to assess a vehicle's rollover propensity."

But there are no industry-accepted tests for rollover propensity - a point NHTSA itself makes elsewhere in its letter to the Center.

A vehicle like the Suzuki is at risk of rollover when it's steered first in one direction and then quickly back - a sudden maneuver that one might have to perform to avoid an obstacle and then return immediately to the proper lane.

One test performed for Suzuki involved driving the Samurai in a circle with a 200-foot diameter at an increasing

speed until the vehicle began to slide. Another involved driving in a circle at a fixed speed, gradually decreasing the circumference of the circle until the vehicle began to slide. Neither test required a change in direction, the maneuver that caused the Samurai to roll over in our tests. More importantly, neither test resembles anything a driver might do on the road; one doesn't drive in circles to avoid an accident. Driving in circles tests the adhesion of tires, not the propensity of a vehicle to roll over.

A third test performed for Suzuki looks superficially like an avoidance maneuver, since the car was run through a slalom course. But in a realistic avoidance maneuver, a car is steered first to the left and then back to the right immediately. In the Suzuki test, the car was steered to the left, then straightened and allowed to recover before returning to the right lane. That is a simple lane-changing maneuver, not an accident-avoidance maneuver.

NHTSA also adopted as its own another of Suzuki's arguments: Using the accident-avoidance maneuver developed by CU, the agency stated, "probably any light utility vehicle could be made to roll over." But NHTSA offered no evidence or independent test results to support such a speculation. In fact, no vehicle other than the Suzuki has rolled over in the 10 years we've tested for accident-avoidance.

APPENDIX H — DID SUZUKI IGNORE WARNINGS ABOUT SAMURAI? COURT PAPERS SAY YES, SECTION: ONCE OVER; VOL. 57, NO. 5; PG. 294, COPYRIGHT 1992 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, MAY, 1992

BODY:

On June 9, 1987, Jacquelyn Kay Langworthy was driving a Suzuki Samurai to work in Gowen, Mich., when an oncoming car crossed into her lane. According to the police accident report, Langworthy swerved to her right to avoid a collision. Her Samurai rolled over at least twice before coming to a stop. Langworthy, age 25, died in the accident.

The following year, when we published the results of our tests of the Samurai, we reported that the vehicle's light weight, high center of gravity, narrow track width, and short wheelbase made it unreasonably prone to roll over in sharp turns. We judged the Samurai Not Acceptable, a step we have rarely taken in our tests of autos.

Our findings should have come as no surprise to Suzuki, it now appears. Documents recently produced in a Georgia court case show that General Motors sounded its own alarm to Suzuki at least four years before CU did. In dismissing Suzuki's defense and ordering sanctions against the company and its attorneys for failing to fully and fairly answer questions or produce documents, Judge B. Avant Edenfield offered this telling chronology.

In a letter dated July 10, 1982, Suzuki Chairman Osamu Suzuki suggested that GM Chairman Roger Smith consider marketing a Suzuki sport-utility vehicle in the U.S. Although

his letter deals primarily with the SJ410, a predecessor of the Samurai, Suzuki also mentions that an improved model could be available in 1985. The new model would be known as the SJ413, or Samurai.

On May 13, 1983, after what it called "considerable test and evaluation" of the SJ410, GM informed Suzuki that it would not market that model because if would require "major modifications [that] would compromise vehicle design and cost."

In a letter to Suzuki dated April 9, 1984, GM detailed its concerns about the new model. "We have continued management discussion on the SJ413 [Samurai] and have reaffirmed Chevrolet's interest in marketing this vehicle," a GM executive wrote, adding that "Chevrolet's concerns are . . . that previously defined engineering matters first be mutually resolved - particularly perceived rollover tendencies which have proven to be a major concern in the U.S. market."

Judge Edenfield concluded, "The GM materials suggest that Suzuki was aware that the SJ410 had a propensity to roll over, and that Suzuki knew that certain design changes were necessary to correct this problem. By showing that Suzuki did not change these design features before producing the Samurai and marketing it in the United States, it appears that the Plaintiffs will have a strong argument for punitive damages."

Suzuki's lawyers initially claimed there was no evidence that GM ever sent those letters, which the plaintiff's attorneys had obtained from GM. The court said it "simply does not

find it credible that no one at Suzuki was aware of the communications." Suzuki, meanwhile, is appealing the judge's decision.

The National Highway Traffic Safety Administration, a reluctant Federal watchdog, acknowledges that the Samurai has a high rollover rate, but it has refused to call the vehicle defective and order a recall. The agency has only recently begun work on standards to address rollover problems for all vehicles. CU petitioned the agency for such standards in 1988.

Eventually, that may lead to improvements in the design of sport-utility vehicles. Meanwhile, there are still too many hazardous Suzuki Samurais on U.S. roads.

APPENDIX I — MEMORANDUM OF WINIFRED CONKLING TO IRWIN LANDAU DATED SEPTEMBER 19, 1988

Re: Suzuki Samurai Follow-up II
cc: Bob Knoll and David Pittle

MEMO

The following is a paragraph by paragraph response to

(1) the National Highway Traffic Safety Administration's denial of the Center for Auto Safety petition for a recall of the Suzuki Samurai and

(2) NHTSA's letter granting CU's petition for rulemaking to establish a minimum rollover standard.

Appendix I

DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration
Denial of Motor Vehicle Defect Petitions;
CFAS/Cole, SFCM/Sack

This notice sets forth the reasons for the denial of a petition submitted to NHTSA under section 124 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*).

In February 1988, Mr. Samuel H. Cole of the Center for Auto Safety (CFAS) petitioned the NWSA to conduct a defect investigation into the alleged rollover propensity of the Suzuki Samurai and Suzuki "variants" of the Samurai, the SJ410 and LJ80 vehicles. In July 1988, Sylvan H. Sack of the Safety First Club of Maryland also petitioned the agency to open a defect investigation and recall of the Suzuki Samurai and its variants.

Both petitions for a defect investigation are denied. The rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles. Rollovers where they have occurred often appear to have been influenced by adverse driver and environmental factors such as high risk driving maneuvers, drinking, low ambient light, and lack of driver familiarity either (sic) the vehicle or the road.

NHTSA has based its denial on the premise that the rollover rate for the Suzuki Samurai is within the range of other light utility vehicles. This is wrong.

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According to NHTSA's CARDFile data, 64 percent of all singlevehicle Samurai accidents involve rollovers. That's more than twice the average for sport-utility vehicles (30 percent). Rollover rates for other vehicles are: 49 percent for the CJ-5, 36 percent for the CJ-7, 30 percent for the Ford Bronco (NOTE: Figures for the Ford Bronco II, which is more prone to rollover, have not been calculated), 24 percent for the Chevy S-10 Blazer, 15 percent for the average small passenger car, and 8 percent for average full-sized sedan.

It should also be noted that the rollover figures for the Samurai may be deceptively low. As we reported in the July Consumer Reports article on the Samurai, a substantial number of Suzuki rollovers go unreported. The Samurai is lighter than other sport utility vehicles, and some drivers set their overturned Samurais upright and drive away without reporting the accidents.

NHTSA states that adverse driver and environmental factors "influenced" the number of Samurai rollovers. Adverse conditions do not cause rollovers. Samurai advertising targets young, inexperienced drivers who may be more likely to drive under the influence of alcohol or try high-risk maneuvers. That may explain a higher than normal accident rate, but it does not explain the higher than normal rollover rate.

There were 192,126 Suzuki Samurai, SJ410 and LJ80 vehicles sold in the U.S. from August 1980 through March, 1988, of which less than 16,000 vehicles were the SJ410 and LT80 models. The SJ410 and the LJ80 were sold from

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August 1980 through 1985 in Hawaii, Puerto Rico, and the Virgin Islands, but not in the continental U.S. The Samurai was first introduced it April 1985, with the convertible or soft top bodystyle accounting for most of the vehicle sales (80 percent). The SJ410 and L780 vehicles were predecessors of the Samurai and were sold without a roll bar or stabilizer bar which are standard-equipment in the Samurai.

There are 113 reported rollovers, 91 involving the Samurai, 15 involving the SJ410, 5 involving the LJ80, and 2 are unknown Suzuki vehicles. Thirteen of the vehicles are reported to be hardtops, 62 are convertibles, and the remaining are not identified. These reported rollovers involve 120 injuries and 25 fatalities. The report sources include CFAS, Suzuki, NHTSA's Fatal Accident Reporting System (FARS), and the public.

> *We have no choice but to assume the NHTSA figures are accurate reflection of reported rollovers, but, as we've already noted, an unknown number of Samurai rollovers are not reported.*

The average time of ownership prior to a rollover was less than 8 months, ranging from 2 to 15 months. Rollovers involved young drivers (73 percent were 25 years old or younger). Alcohol usage was found in approximately 50 percent of the police-reported rollovers. The driver was cited by police for a traffic offense in 50 percent of the police reports. The rollover was also likely to occur at night (58 percent) on a weekend (55 percent) California was found to have twice the number of rollovers as any other state (20 percent versus 9 percent for Florida). Occupant ejection

was involved in all fatal first event rollovers and most serious injury rollovers. In most instances it appears that ejection may have been prevented had the safety belts been used at the time of the rollover. Multiple-vehicle crashes accounted for 10 of the rollovers. Only one report involved a rollover which took place entirely off-road (a SJ410 vehicle).

> *The fact that a great number of Samurai rollovers involve young drivers who have owned their vehicles for less than one year comes as no surprise. The vehicle is marketed to first-time, low-income drivers.*
>
> *A 1983 NHTSA study concluded that drivers who are unfamiliar with their cars are two to three times more likely to be involved in accidents. People who have driven a vehicle less than 500 miles are involved in 12 to 17 percent of all accidents; people who have driven a vehicle less than 1000 miles are involved in 17 to 24 percent of all accidents. The critical factor is a driver's experience with a given car, not a driver's total driving experience.*
>
> *Unfortunately, NHTSA has not done research on average time of ownership, driver age, alcohol use, driver error, or seat belt use for other vehicles with high rollover rates. NHTSA did a special study of the Samurai; comparable data is not available for other make/model comparisons.*

A comparison of the Samurai rollover experience to peer light utility vehicles was made using the 1987 Fatal Accident Reporting System (FARS) file. The comparison was made

based on normalized vehicle populations of 1986-1987 model light utility vehicles with at least 25 fatal crashes in the FARS file; the Ford Bronco II, the General Motors Corporation S-10 Blazer/S-15 Jimmy, and the Jeep Cherokee/Wagoneer vehicles. The Bronco II (approximately 19 per 100,000 vehicles) was found to have more than 3 times the first event rollover (the rollover was not subsequent to a collision or impact) involvement as the Samurai. The Samurai had a first event rollover involvement (approximately 6 per 100,000), but exceeded the Cherokee first event rollover (approximately 2.5 per 100,000) involvment.

> *NHTSA is playing with the numbers. The discussion has gone from rollover rates to fatality rates. These figures show that more people die in Ford Bronco II rollovers than in Suzuki Samurai rollovers. This is interesting, but it has nothing to do with rollover propensity. The Bronco II rollover fatality rate may be higher because the accidents are more severe, or because people drive their Broncos more miles than they drive their Samurais, or because of some structural difference between the vehicles. The fatality rate can be influenced by a number of factors.*

For the class of vehicles and in particular for the Suzuki Samurai, the vehicle operator appears to be a major factor in light utility vehicle rollovers. The lack of utility vehicle driving experience exhibited by the Suzuki drivers (and demonstrated in ODI's previous investigation of Jeep CJ-5 vehicle rollover) and other contributing factors identified in the crash analysis indicate that the driver's familiarity with the vehicle appears to be the most important factor in the

occurrence of a the (sic) rollover event. The Samurai's relatively short wheel base, narrow track width, and low mass may make it more maneuverable, which may be beneficial for accident avoidance. However, such characteristic may increase the chance that inexperienced drivers when reacting to an unexpected event, may oversteer or over correct the vehicle inducing a high lateral acceleration which can result in a rollover. The likelihood of a rollover is dependent on a variety of conditions present at the moment such as vehicle condition, road/ground surface, topography, and vehicle speed.

> *NHTSA's claim that "the driver's familiarity with the vehicle appears to be the most important factor in the occurrence of a the (sic) rollover event" contradicts another NHTSA report. In a NHTSA report titled "Analysis of the Relationship Between Vehicle Rollover Stability and Rollover Risk Using the NHTSA CARDFile Accident Database," the authors conclude that "the overwhelming variable in explaining rollover rate variations as a function of vehicle make/model designation, is the vehicle rollover stability factor." NHTSA initially refused to release this paper, but it is now a public document.*

The Samurai was found to have a static stability factor (ratio of the half track width to center of gravity height) higher than most other light utility vehicles when empty. The Samurai ranges from 1.08 to 1.13. The class of light utility vehicles ranges from approximately 1.03 to 1.22. The stability factor has been shown to have a positive statistical relationship to the likelihood or a vehicle rolling over in an

accident, although other factors such as wheel base and tire traction are also involved. Those vehicles with higher stability factors tend to have lower rollover in a crash. The Samurai's center of gravity height increase by more than 3 inches with 4 adult (150 pounds each) occupants, causing the stability factor to decrease approximately 13 percent. As the vehicle load is increased, the stability factor decreases, because the center of gravity of the low mass Samurai is readily affected by the added mass and the location of that mass in the vehicle. This effect is even more pronounced in the convertible or soft top bodystyle. However, even when loaded the Samurai stability factor remains within the range of light utility vehicles.

What this paragraph doesn't say is that the Samurai's is center of gravity is more affected by load than other sport-utility vehicles.

FYI: In CU's test of the Samurai, the outriggers actually lowered the center of gravity by 0.28 inches, making the Samurai <u>less</u> prone to rollover.

NBC News, Consumers Union, and Suzuki all conducted dynamic vehicle testing to assess the rollover propensity of the Samurai. NBC News and Consumers Union were able to demonstrate some rollover propensity. However these test were apparently not well instrumented and were not recorded for analysis. Suzuki's testing demonstrated that the Samurai (and its variants the SJ410 and LJ80) satisfactorily completed industry accepted (such as Society of Automotive Engineers and International Standards Organization) tests which might be used to assess a vehicles rollover propensity. Suzuki also

attempted to replicate the Consumers Union double lane change, obstacle avoidance maneuver. In the replication, Suzuki was able to induce tip-up unto (sic) the outriggers with both an Isuzu Trooper II (one the of the models used in the Consumers Union test), and a Samurai at speeds at which the vehicles also successfully traversed the course, although the course may have been less stringent than the Consumer's Union course. The Suzuki tests were instrumented so that steering angle, lateral acceleration, roll angle and yaw rate could be recorded. There appears to have been sufficient latitude to allow a driver, either knowingly or unknowingly, to influence the testing without readily being detected by the available instrumentation.

First, it should be noted that NHTSA conducted no dynamic tests of its own. It relied on Suzuki's data entirely. It should also be noted that NHTSA never asked CU to share its data or test procedures

NHTSA's charge that CU's tests were "not well instrumented and were not recorded for analysis" is an attempt to invalidate the test results. CU's used external instruments to measure vehicle speed and the tests were videotaped for analysis. Internal instrumentation was not necessary—anyone could see that the Samurai tipped over during the tests.

NHTSA seems to have accepted that Suzuki has "satisfactorily completed industry accepted tests" for rollover propensity. However, no such rollover tests exist. (That's why CU petitioned NHTSA to develop a rollover stability test and standard.)

Appendix I

Suzuki did run the Samurai through several tests. One involved driving the Samurai in a circle with a 200-foot diameter at an increasing speed until the vehicle began sliding. Another involved driving in a circle at a fixed speed, gradually decreasing the circumference of the circule until the vehicle began to slide. Neither tests involves steering reversal, the maneuver that caused the Samurai to roll.

In a third test, the Samurai was driven back and forth between pylons at a steady speed. In the final test, the Samurai was taken through a lane change—the vehicle changed lanes, recovered, then returned to the starting lane. This test simulated passing a vehicle on the road, not an abrupt accident-avoidance maneuver.

Basically, these tests measure tire adhesion more than rollover propensity. According to Bob Knoll, there would be more difference in test results from one brand of tire to another than from one vehicle to another.

Suzuki claims it "passed" these tests. No congratulations necessary, there's no way to fail. There are no accepted performance criteria for any of these "industry approved" tests.

NHTSA also cites the results of Suzuki's attempt to replicate CU's tests. NHTSA notes that "the course may have been less stringent than the Consumer's Union course" but neither Suzuki nor NHTSA mention any reason for a change in the course. CU provided Suzuki with the exact test procedure.

Appendix 1

Finally, NHTSA implies that because CU's test vehicles were not internally instrumented CU's drivers could have influenced the test results. NHTSA does not acknowledge that CU repeats its tests several times with several drivers to minimize the possibility of driver bias.

The existing test procedures for assessing the rollover propensity of vehicles are unsatisfactory because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver and the presumption that the vehicle suspension, tire, and road surface characteristics will remain constant throughout the testing. At present there is no standard, accepted test or series of test procedures and performance requirements which accurately predict a vehicle's rollover propensity.

Since analysis of the reported crash data does not show that the Samurai have been involved in a greater rate of rollovers than comparable other vehicles, there does not appear to be a basis for expecting the further investigation would reveal a significant number of failures in performance or manufacturing safety defect trend. In addition, the known performance test and measure of vehicle characteristics such as the stability factor are not sufficiently reliable or discriminating among vehicles to identify a defect in construction, components, or materials that would contribute to the propensity or Samurai vehicles to roll over. Moreover, to the extent that such tests or measures have been applied, they do not convincingly identify the Samurai as more likely to be involved in rollover accidents than other light utility vehicles. A further commitment of investigative resources

does not appear likely to result in the gathering of evidence of significant numbers of failures or in development of tests or measures or other analysis that would support a defect determination. There does not appear to be a reasonable possibility that an investigation would result in an order to Suzuki to recall the vehicles.

Once again, NHTSA's CARDFile date does show that the Samurai's rollover rate is higher than other sport-utility vehicles.

NHTSA's claim that it does not expect to identify "a defect in construction, components, or materials that would contribute to the propensity of Samurai vehicle to roll over" comes as no surprise The problem is with vehicle design.

NHTSA's conclusion that "there does not appear to be a reasonable possibility that an investigation would result in an order to Suzuki to recall the vehicles" is indicative of the organization's impotence. As we will point out in the upcoming Consumer Reports article on recalls, under the current administration NHTSA refuses to pursue investigations that are not likely to result in "easy" recalls.

Other issues in addition to the rollover propensity issue are the rollover integrity of the vehicles and the survival of the occupants after a rollover. Analysis of the crash data does not suggest that the Samurai structure fails to protect occupants who remain in the vehicle. However, the Samurai convertible or soft tops with the roll bar assembly withstood

the rollover forces better than the hardtop versions without the rollbar.

This paragraph raise the issue of import classification. Because the Samurai is usually imported as a truck, it does not have to meet the same safety standards (including roof integrity) as a passenger car. Details on the import issue were included in the first collection of Suzuki material. (I have more information if you want it.)

The Consumers Union and the NBC News testing results are cause for some concern, but the test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data. Using the same procedures, probably any light utility vehicle could be made to roll over under the right conditions and driver input. The agency has embarked on a research program to investigate rollover propensity and will study handling tests and performance criteria that can be used for rulemaking as well as defect investigation purposes.

CU's test do have a scientific basis and are linked to real-world crash avoidance needs. The lays of physics apply to all vehicles whether or not they are internally instrumented. You don't need to know the lateral acceleration or yaw rate to know that a vehicle is turning on its side. CU's accident-avoidance maneuver was far more realistic than Suzuki's tests of driving in circles and weaving in and out of pylons.

Appendix 1

Letter to Kristen Rand, CU/Washington office

The purpose of this letter is to notify you that the National Highway Traffic Safety Administration (NHTSA) has decided to grant the petition of June 2, 1988, by the Consumers Union of United States, Inc. (Consumers Union) to initiate rulemaking proceedings to establish a minimum standard to protect against unreasonable risk of rollover.

The agency believes the issues raised by Consumers Union warrant further consideration. Because NHTSA has already initiated research into the issue of the rollover safety of all light duty vehicles, including passenger cars, light trucks, van and multipurpose passenger vehicles, to determine whether rulemaking is appropriate, we have granted your petition. A summary of the ongoing and planned research is included in the enclosed table. The results of NHTSA'a research investigations will yield information on the issues raised by your petition, and that information will be used to determine whether further rulemaking is appropriate.

> *NHTSA started its rollover research in late 1987. Felrice claims the Suzuki Samurai rollover issue had nothing to do with NHTSA's plans to conduct research on the rollover problem.*

As you have noted, this agency has recently denied a petition for rulemaking to establish a safety standard limiting the rollover propensity of light duty vehicles. We denied that petition for several reasons, including our determination that establishing the specific minimum stability factor requested in the petition would be too narrow an approach

to the complex rollover problem. Your petition, however, does not purport to isolate a single cause of rollover. In fact, it acknowledges that there are "factors other than a vehicles' stability factor (which) play a role in rollover causation." We believe that granting your petition is consistent with the steps we have taken to address the problem.

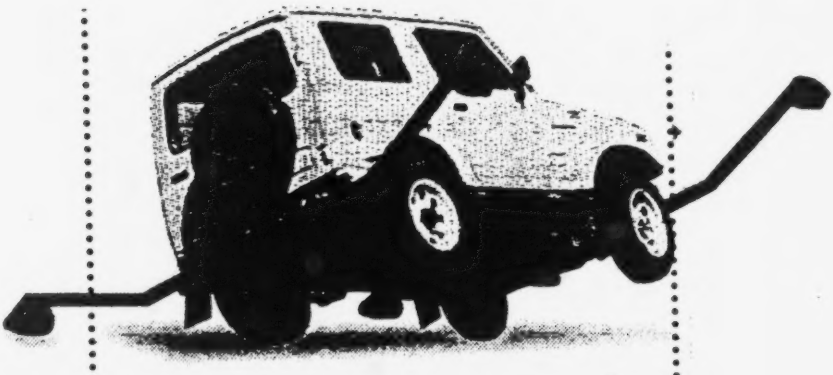
The granting of this petition does not necessarily mean that a rule will be issued. Based on the results of the agency's research and analysis of other available information, the determination of whether to issue a rule will be made in the course of the rulemaking proceedings, in accordance with statutory criteria.

According to Felrice, rulemaking usually takes from two to six years. He estimated that the rollover rulemaking would take about four years.

NHTSA's claim that "using the same (CU) procedures, probably any light utility vehicle could be made to roll over" has trot been true in CU's experience. Three other sport-utility vehicles were taken through the same accident-avoidance test as the Samurai and none showed a propensity to rollover.

George L. Parker
Associate Administrator
for Enforcement

APPENDIX J — EXCERPT FROM 60TH ANNIVERSARY EDITION OF CONSUMER REPORTS



1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable.

(2)

SEP 22 2003

No. 03-281

IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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31pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the summary judgment standards set forth by this Court in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), by refusing—*after* reviewing the evidence submitted by both sides—to make credibility determinations or to weigh the evidence.

2. Whether the court of appeals correctly determined, under *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 654 (1989), (i) that a jury can infer actual malice from evidence that a publisher purposefully avoided addressing or rebutting a specific, technical criticism by a government agency of a "testing" methodology used to disparage a consumer product, and (ii) that a jury finding of actual malice based on other evidence can be buttressed by evidence of the publisher's financial problems.

RULE 29.6 STATEMENT

Plaintiff Suzuki Motor Corporation is the parent of Plaintiff American Suzuki Motor Corporation. General Motors of Canada Limited (a wholly-owned subsidiary of General Motors Corporation, a publicly traded company), owns 20.3% of Suzuki Motor Corporation.

All parties to the proceeding are listed in the caption of the case.

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INTRODUCTION

Any fair review of the panel's decision reveals that the court below faithfully applied settled standards governing a Rule 56 motion for summary judgment on a First Amendment issue of actual malice. In asking this Court to revisit those standards, the petition by Consumers Union of United States, Inc. ("CU"), all but ignores the fact that this Court has already addressed this issue not once, but twice, in the recent past. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). CU also ignores this Court's repeated teaching that, consistent with the Seventh Amendment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." 477 U.S. at 255. Instead, CU's petition treats *Anderson* as an irrelevancy, relegates *Masson* to a footnote at the end of its petition, and never even cites Rule 56.

Even more troubling (especially in a case in which candor is the central issue), CU bases its request for review—and particularly its claims of a conflict among the lower courts—on multiple, obvious mischaracterizations of the decision below. For example, CU accuses the panel of considering only the evidence submitted by the plaintiff, when, in fact, both the majority and concurring opinions explicitly considered the evidence submitted by *both* sides. CU also accuses the majority of holding that a jury could find "purposeful avoidance" based solely upon a "disagreement with [the] government," Pet. 28, when, in fact, the majority held that such a finding could be based, not on a disagreement, but on clear evidence that CU utterly *ignored* the government's specific finding that CU's testing methodology was "driver-dependent" and therefore easily manipulated.

Nor is there any basis for the suggestion by CU and its *amici* that the Court must now revisit the standards it estab-

lished in *Anderson* and unanimously reaffirmed in *Masson*, lest it risk the "death of consumer ratings," Pet. App. 49a (Kozinski, J.), or "chill core free speech," Pet. 24. Those settled standards provide robust protection for First Amendment values while still allowing egregious cases to be heard by a jury.

This is such a case. As the majority correctly concluded, there is clear and convincing evidence for a reasonable jury to find that CU fabricated its test results and then tried to cover up that fabrication. Whether a jury draws that conclusion will turn on questions of credibility which all agree can be resolved only by a jury.

COUNTER-STATEMENT OF THE CASE

This case concerns statements by CU that its tests showed the Suzuki Samurai, a small sport-utility vehicle, "easily rolls over in turns." CU published that statement, among other places, in the January 1996 60th Anniversary Issue of *Consumer Reports*. Ninth Circuit Excerpts of Record ("ER") 936. That issue, a promotional piece that touted CU's accomplishments, highlighted CU's 1988 review of the Suzuki Samurai. Under a staged photograph of a Samurai tipped up on two wheels, CU described how it had destroyed this once-popular sport utility vehicle:

> **1986** CU buys its own auto test track in rural Connecticut. Two years later based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away.... (ER940.)

For present purposes, there can be no dispute that CU's statements about the Samurai were false. CU did not contest falsity in its motion for summary judgment. See CU Mot. for Summ. J., D. Ct. Docket No. 211, at 1. Nor has CU pursued the argument (advanced by Judge Kozinski below, Pet. App. 58a-59a, 61a) that its statements were pure "opinion" pro-

tected by the First Amendment, or that they were in some sense "accurate[]." Instead, the question presented at this interlocutory stage is whether the record contains sufficient evidence of CU's knowledge, or purposeful avoidance, of the falsity of its statements to support a jury determination of actual malice. Given the one-sided presentation in CU's petition (including its misleading references to "findings" by the district court[1]), and the *en banc* dissent's misreading of the summary judgment record, it is important to address with some care the key evidence on this point.

Contrary to the assumption of the *en banc* dissent, the "central facts that undergird Suzuki's claim" are not that the Samurai "did well on CU's standard course," but then "did far worse than its competitors" when "CU ... modified the course to make it more challenging." Pet. App. 49a. The central facts, rather, are that CU rigged the test and then lied about the Samurai's performance. Specifically, after the Samurai passed CU's very stringent standard testing with flying colors, CU employees deliberately rigged their additional testing (a) by first figuring out how to use stunt-like steering to make the Samurai tip up, then (b) using that information to design a course that was, in the government's words, "driver-dependent" and therefore subject to manipulation, then (c) driving the Samurai differently than other vehicles in that course, and (d) concealing that manipulation by failing to instrument the tests.

Contrary to CU's claim, Pet. 26-29, the evidence also shows that CU did more than "disagree[]" with NHTSA's assessment. In fact, CU purposefully avoided addressing NHTSA's key criticism: that CU's testing was so driver-

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[1] *E.g.*, Pet. 5, 6-7, 8, 9, 10 & n.2, 13, 30 (referring to the district court's supposed "findings" of "undisputed fact"). At summary judgment, a district court does not make factual "findings," and its conclusions—including its conclusions about which points are "disputed" and which are not—are reviewed de novo. 11 J. Moore, *Moore's Federal Practice* § 56.41[3][a] (2003).

dependent that it was scientifically invalid and misleading.

1. The Summer of 1988. Contrary to the impression CU seeks to convey, Pet. 6, the Samurai received wide acclaim in the automotive press following its 1985 introduction in the continental United States. ER752-85. And it was an immediate success: 150,000 Samurais had been sold in the United States by 1988. Pet. App. 3a. Perhaps because of this success, in early 1988 the Samurai was the subject of an unfavorable *NBC-TV* story purporting to show that it had a tendency to tip up in sharp turns. Supp'l ER ("SER") 77. The NBC tests were later rejected by NHTSA, along with CU's tests, as unscientific and driver dependent. ER735.

a. CU's 1988 Testing. Shortly after the *NBC-TV* story, CU began developing its own story about the Samurai's supposed propensity to roll over. ER194. CU's effort was spearheaded by Irwin Landau, CU's Editorial Director. ER1262-73. Because (as he later admitted) he wanted the article to have a "particular take," Landau assigned himself as both author and principal editor. ER1081-83, 1825-26.

"Never felt like it would tip over." On April 20, 1988, Landau and David Pittle, CU's Technical Director, made an unprecedented trip to CU's test track to see the Samurai's performance in CU's avoidance maneuver test. ER1176-77, 1550-51, 1553-55, 1824. The first maneuver CU conducted that day is now known as CU's "standard" or "long-course" avoidance maneuver, a test that CU had used since 1973. It is a severe, slalom-style lane-change maneuver. It was designed, according to CU, to replicate an emergency situation where a driver swerves a vehicle into the opposing traffic lane to avoid an obstacle and then steers quickly back into the original lane to avoid oncoming traffic. Pet. App. 3a-4a. As CU had known for years, this maneuver is "very stringent" and tests vehicles to the "limit" of their performance. ER2200 (Video Excerpt L), 875, 22.

Pittle invited Landau to attend the testing principally be-

cause he thought they would see the Samurai tip up. Pet. App 4a. But the Samurai did not tip up according to expectation. Instead, as shown by the videotapes (ER2200 (Video Excerpts A & B), 203) and test logs (ER201, 202) first obtained in discovery, the Samurai performed flawlessly in this demanding maneuver. Kevin Sheehan, CU's most experienced test driver, drove the Samurai repeatedly through CU's maneuver at speeds over 50 mph. Not once in 16 runs did the Samurai's tires leave the pavement. Pet. App. 4a; ER203, 977, 2200 (Video Excerpt A). Sheehan's evaluation states that the Samurai "never felt like it would tip over," Pet. App. 4a; ER201, and he rated the Samurai as highly as any of the four vehicles he tested that day. Pet. App. 4a; ER205. His conclusions were confirmed by a second test driver, Rick Small. Pet. App. 5a; ER205, 977.

By the end of CU's planned testing, the Samurai had been tested more rigorously—37 times at speeds up to 56.6 mph—than the other three vehicles CU was testing that day, the Isuzu Trooper II, the Jeep Wrangler, and the Jeep Cherokee. ER976-77. The Samurai had received higher overall stability ratings than any of them. And it had not "easily roll[ed] over in turns," as CU later claimed it had a propensity to do. ER1315, 976-77.

"If you can't find someone to roll this car, I will." If CU had ended the testing there—as was its established practice, ER1659-60—CU would have had to give the Samurai a stellar rating. However, according to eyewitness testimony by former CU employee Ron Denison, Landau was not satisfied with the results and said to one or more of the assembled testing personnel: "If you can't find someone to roll this car, I will!" Pet. App. 5a; ER1186-88.

Soon thereafter, David Pittle, an engineer who supervises CU's testing, ER1500, drove the Samurai through the course. He completed CU's standard course nine times without incident, achieving a top speed of 49 mph. Pet. App. 5a; ER978. However, on Pittle's tenth run (the Samurai's 47th), Pittle

wrenched the Samurai even more sharply than called for by CU's standard maneuver. As Sheehan later described it, Pittle began his initial left turn too late to get through the course cleanly, and thus was required to steer more violently back to the right. ER1652-53. As a result of Pittle's extreme steering, the Samurai's right wheels briefly lifted about eight inches off the ground. ER1366-67. Sheehan later testified that, if he were *trying* to make a vehicle tip up, he would have steered it exactly as Pittle did in his tenth run. ER1692-95.

CU's test videotape captured cheering and shouting as Pittle achieved Landau's stated objective of making the Samurai tip up. One onlooker yelled, "yeah!!!" Another employee exulted "I think I got that, I think I got that!," Pet. App. 5a; ER2200 (Video Excerpt C), 203, in a joyous tone that can only be appreciated fully by viewing the videotape.

"All right Ricky Baby." Having discovered a way to make the Samurai lift its wheels, Pittle then directed Robert Knoll, the head of CU's auto testing division, to re-design the avoidance course to "duplicate what [Pittle] did on [his tenth] run." ER1360-61, 1654, 1581. The modified course was, in effect, a stunt maneuver known as an "S turn," ER620, a manipulable procedure in which a skilled driver using the right steering inputs can cause almost any vehicle to tip. ER559-60, 588-89, 593-94, 611, 1370-71.

The evidence shows not just that this maneuver was more "challenging," as the *en banc* dissent put it. Pet. App. 49a. The evidence also shows that CU already *knew* that, using this kind of driver-dependent maneuver, many vehicles could be tipped up with sufficiently severe steering. ER1810-11. In fact, numerous vehicles can be made to tip up in CU's modified course, including vehicles that CU has rated "Acceptable." ER559, 588-89, 612-13, 1014, 1026, 1027, 1065-66, 1067, 2200 (Video Excerpts I-K).

On April 26, 1988, CU went back to the track for more "testing" on this new course. The videotapes show that, even

with Knoll's course modifications, CU's drivers, far from being able to make the Samurai "easily roll over," still had difficulty manufacturing a Samurai tip-up. ER203, 2200 (Video Excerpt D). The first driver was Fred Wood. Pet. App. 6a; ER1947. He made 14 runs on the modified course before achieving a tip-up. Pet. App. 6a; ER978, 1370-71. On the last run, after Wood got the Samurai to tip onto two wheels, Knoll is heard on the videotape saying, "That's it. That looked pretty good!" Pet. App. 6a; ER2200 (Video Excerpt E), 203. (Knoll later testified that he was "relieved" when Wood finally made the Samurai tip up. Pet. App. 6a; ER1401.)

CU then changed drivers. According to CU's test records, the second driver, Rick Small, was able to tip the Samurai on his second run, after which he too quit. Pet. App. 6a; ER207. Once again, CU's test track personnel cheered the result, with CU employee Joe Nappi shouting out: "All right, Ricky baby." Pet. App. 6a; ER2200 (Video Excerpt F), 203, 1011-12. This comment would later become the subject of a false affidavit signed by Knoll and four other CU employees in an apparent effort to discredit Denison, the whistle-blower who testified about Landau's threats to the testing staff.[2]

"[N]o lift off the ground, Oh God." After the April 26 testing, CU decided to label the Samurai "Not Acceptable." ER1381-84. But it scheduled another day at the test track for "shooting [a] movie"—for the national press conference CU had already planned. ER868-70, 1338, 1411.

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[2] After Denison testified in his deposition that Landau had threatened to "find someone to roll [the Samurai]," CU crafted a false affidavit signed by Knoll, test drivers Sheehan and Wood, and technical assistants Joe Nappi and Alan Hanks. Each initially swore he was present at the April 26, 1988 testing and that it was Denison who had cheered when Rick Small caused the Samurai to tip up. ER975. However, Knoll later admitted that this sworn statement was "not true." ER1394-95, 1403. Sheehan admitted he was not even present at the April 26, 1988 testing. ER1651, 1672. And Nappi admitted it was his voice, not Denison's, on the tape. ER195-96.

Once again, the videotapes show, not that the Samurai "easily rolled over," but that CU's drivers continued to have difficulty tipping it up. Apparently concerned about the impending press conference, Pittle at one point exclaimed: "Can't you just see it, we get no lift off the ground. Oh God." Pet. App. 7a; ER2200 (Video Excerpt G), 240, 1007-08. Eventually, however, CU's drivers were able to achieve the picture-perfect tip-ups CU has featured ever since.

A wealth of other evidence confirms that CU's inherently manipulable test was rigged to make the Samurai appear unstable.[3] Indeed, contrary to Judge Kozinski's assumption, Pet. App. 59a, the evidence shows that CU drivers drove vehicles other than the Samurai differently when they tested them—something of which the drivers and other testing personnel must have been aware. ER560, 589-90, 593-94 And expert testimony reveals that a tip-up of the Samurai could *only* be achieved deliberately. ER613, 614.

As the majority concluded, all of this evidence provides ample grounds for a jury to find by clear and convincing evidence that, when CU claimed its tests showed the Samurai "easily rolls over in turns," CU knew such statements were false. Indeed, contrary to the *en banc* dissent, Pet. App. 59a, a jury plainly *could* find this to be "a case where a defendant fabricates results and then purports to rely on them."

b. The 1988 Press Conference and Article. CU's subsequent conduct confirms this. On June 2, 1988, CU held a press conference to announce that it had tested the Samurai and rated it "Not Acceptable," and that CU planned to report this finding in the July 1988 issue of *Consumer Reports*. Pet. App. 7a; ER87, 987, 1968, 2200 (Video Excerpt L). During the press conference and in the subsequent article, CU per-

[3] For example, expert opinions establish that CU's modified course permits a driver deliberately to tip up a vehicle if he wishes to do so, ER559, and, absent instrumentation, to disguise that fact, ER560, 621-22. Indeed, as the government made clear, virtually any vehicle can be made to tip up in this test. ER613; see also *supra* at 6.

sonnel explained (correctly) that CU's test drivers had put the Samurai through both the standard maneuver and a newly devised "modified" course. Pittle and others then proclaimed that, based on this testing, the Samurai had an "unusually high propensity to roll over while performing an accident avoidance maneuver that could be demanded suddenly of any driver during routine driving." Pet. App. 7a-8a; ER876, 2200 (Video Excerpt L), 875. But the evidence shows this assertion—the gist of which was repeated in all the CU statements at issue here—was knowingly false.

"A Benign Maneuver." First, during the press conference, Pittle lied about the severity of the modified lane-change maneuver to lend plausibility to the claim that the Samurai "easily rolls over." He described the newly devised course as "benign," involving only "very limited steering inputs." Pet. App. 8a; ER2200 (Video Excerpt L), 875 (stating maneuver involved only 90 and 180 degree steering inputs). But Pittle has since admitted, and Knoll confirmed, that his characterization was "not accurate." Pet. App. 8a; ER1349, 1636-37. Sheehan testified that just getting through the new course required much more steering than Pittle had asserted—in fact, about 180 degrees of left steer, followed by 270 to 360 degrees of right steer. ER1696-97. This is significantly more steering that an ordinary motorist would employ, ER560, 596, because it generates about twice as much lateral gravitational force as the average lay driver is willing to endure, ER1362-63. Later evaluations showed that a tip-up required even more severe steering. ER559-61, 749-750, 1350-51. And CU's own test driver later admitted what the videotapes clearly show—that the maneuver was not "benign," as Pittle claimed, but in fact "sudden and violent." ER1698-99.

"Other vehicles passed the course with a yawn." At the press conference, Pittle also misrepresented the performance of other vehicles. He asserted that these vehicles—including the Isuzu Trooper II—had gone through the course with a "yawn." Pet. App. 8a; ER2200 (Video Excerpt L), 875. Yet,

on the unedited testing videotape, Knoll can be heard remarking that the Trooper II "is going to have a difficult time getting" through the modified course. ER1343-46.

Indeed, as Pittle later admitted, CU ran the Trooper II through the modified course only *four* times, and three of those times it failed by hitting cones. ER1627-31, 981. (This of course contradicts the *en banc* dissent's key assertion that "every other tested vehicle did pass" the short course. Pet. App. 61a.) Moreover, the evidence shows that, if CU employees had wanted to make the Trooper tip up, they could have done so with the same steering and timing strategy CU employed with the Samurai. ER559, 565, 577, 590, 593, 1026, 2200 (Video Excerpt I).[4] But that, of course, would have undermined CU's claim that the Samurai rolls over "easily" by comparison to other vehicles.

"Use a technical project and turn it into a fundraising appeal." CU's press conference and article produced the most extensive media exposure CU had ever received. ER871. This was particularly important at this point in CU's history because CU was, in the district court's words, "financially overextended" because of capital investments. Pet. App. 3a n.1. And CU knew its magazine sales and fundraising efforts would be more successful if it published an article exposing a "hidden" danger in a popular product like the Samurai. ER1249-51.

As a result of this publicity, CU was able to use the Samurai story extensively in its fundraising and subscription drives.

[4] Pittle stated at the press conference that the footage of the Trooper II "just didn't make it onto th[e] tape" that CU used at the press conference, ER2200 (Video Excerpt L), 875. Yet he later admitted that *he* had expressly directed his staff to exclude the Trooper II footage from the packet provided to the press. ER1626-27, 1631.

The evidence also demonstrates that CU employees drafted portions of the 1988 article giving favorable reviews to vehicles other than the Samurai *before* those vehicles were even tested, ER 1386-89, 1518-23—a strong indication they had already decided to single out the Samurai for unfavorable treatment, regardless of the test results.

Indeed, CU sent out millions of fund-raising and subscription solicitations featuring the Samurai story, ER903, 935, 1136-40—some within weeks of CU's press conference, ER896. In short, as reflected in minutes of a meeting of CU's own Board of Directors in May 1989, the Samurai story was a classic example of taking "a technical project and turn[ing] it into a fundraising appeal." ER911.

2. The Widespread Rejection of CU's "Testing." At the June 1988 press conference, CU also announced it was submitting its "findings" to the National Highway Traffic Safety Administration ("NHTSA") in support of a petition to recall the Samurai. ER876, 878, 238. In response, NHTSA observed that CU's testing had not been "instrumented" or otherwise "recorded for analysis," and that CU's modified maneuver was highly "driver-dependent," *i.e.*, subject to manipulation. ER735. Accordingly, NHTSA rejected the test procedures "because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver ...." Pet. App. 10a, 288a. The agency further noted that, using CU's "modified course" maneuver, "probably any light utility vehicle could be made to roll over under the right conditions and driver input." *Id.* at 10a; ER735.

Faced with this stinging criticism, CU dodged the key issue. Although it published a critique of portions of NHTSA's analysis, see Pet. App. G, CU never responded to NHTSA's central criticism—namely, that CU had used a manipulable, driver-dependent maneuver, an error it compounded by failing to instrument its tests as a check on driver manipulation. Neither CU's published response to NHTSA, see *id.*, nor its internal research memorandum on the same topic, see Pet. App. I, articulated a basis for disagreement with NHTSA's analysis of this issue. It simply asserted that no instrumentation was necessary because "anyone could see that the Samurai tipped over during tests," *id.* at 286a—which of course ignored the criticism that such tip-ups could have been caused

by driver manipulation. Indeed, some of CU's own employees acknowledged that NHTSA's criticisms were accurate. *Id.* at 24a, 29a. Nor did CU respond to a similar critique by the British motor vehicle safety agency, the Transport Road and Research Laboratory. ER997-98.

According to Professor Edwin Guthman, a Pulitzer Prize-winning journalist and professor at USC, these and other failures were a breach of "basic journalistic standards" and strongly suggest that CU "had a predetermined outcome in mind," ER644, and that "CU turned a blind eye to the information that didn't support its view," ER647. The majority below held that a reasonable jury could reach the same conclusion on the same evidence. Pet. App. 16a.

3. Suzuki's April 1996 Complaint and CU's Reaction. Despite these repeated repudiations of CU's methods and its charges against the Samurai, CU resurrected its "easily rolls over" story in 1996, in its Anniversary Issue and elsewhere. At that point, Suzuki decided it could no longer tolerate the harm that CU's criticisms were doing, not only to the Samurai (which had been discontinued), but to sales of its other vehicles. ER947, 1820. Accordingly, it brought this lawsuit.

"More salt in the wound for Suzuki." Rather than retract its false statements, discipline the offending employees, or take other responsible steps, CU only intensified its disparagement. For example, CU used an August 20, 1996 press conference and an October 1996 article, both of which ostensibly focused on the Isuzu Trooper, to dredge up its disparaging story about the Samurai. ER2012-16. Tellingly, a CU employee's marginal note on a draft of that article observed that references to the Samurai were "more salt in the wound for Suzuki." ER951.[5]

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[5] CU attempts to divert attention from its rigged testing by pointing to irrelevant subsequent events like the discovery dispute at issue in the *Malautea* case, *see Malautea* v. *Suzuki Motor Corp.*, 148 F.R.D. 362 (S.D. Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir. 1993); Pet. 8, which occurred *after* CU's testing. It is inconceivable that this event is relevant to

4. The Decisions Below. On May 3, 1999, CU moved for summary judgment on the sole issue of whether Suzuki could establish that CU acted with "actual malice" under the First Amendment standards articulated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). CU did *not* seek a judgment on the ground that its statements were accurate. Nor, contrary to Judge Kozinski's apparent assumption, Pet. App. 58a-59a, did CU contend that its reviews were statements of "opinion." The district court granted CU's motion and entered judgment against Suzuki on May 25, 2000, although it recognized the record contained "cartloads" of evidence on the issue of actual malice. *Id.* at 83a.

The court of appeals reversed and remanded for trial. The panel expressly applied the summary judgment standards articulated by this Court in *Anderson* and *Masson*. Accordingly, it recognized that it must resolve credibility issues and questions about the weighing of evidence in a light favorable to Suzuki. The court also recognized that it must conduct an "independent examination" of the record evidence. Pet. App. 14a. It thus surveyed the entire record, *including* CU's evidence, and concluded that "[a] reasonable jury could find by clear and convincing evidence that CU sought to produce a predetermined result in the Samurai test." *Id.* at 21a. In other words, a jury could find (under the appropriate legal standard)

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whether CU knowingly rigged that testing. Nor can it possibly be relevant that—again, *subsequent to* CU's rigged tests—CU became aware of lawsuits related to the Samurai, which were likely stimulated by CU's article. CU, moreover, neglects to mention that NHTSA twice denied recall petitions for the Samurai, ER734-36; that, in so doing, NHTSA concluded that "[t]he rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles," ER734; and that Suzuki has prevailed in four out of the five Samurai rollover suits tried to a jury and, in the fifth case, the jury verdict was set aside on appeal.

CU also cites an incident in which one of the Samurais it used in its testing rolled over on its side when its right wheels were driven up what CU calls a "six inch[]" snowbank. Pet. App. 235a. In fact, however, Suzuki's evidence shows that the snowbank was approximately 24 inches—high enough to cause almost any vehicle to tip over. ER552, 1015.

that CU rigged its testing of the Samurai, and therefore that CU acted with actual malice in claiming that its tests showed the Samurai "easily rolls over in turns."

The court also determined there was sufficient evidence to preclude summary judgment on the question whether CU purposefully avoided the truth about the driver-dependency of its testing procedures. Pet. App. 28a. After carefully reviewing the record, *id.* at 24a-28a, and rejecting select portions of Suzuki's argument, the court determined that CU had "done nothing to respond to the criticism of its testing procedures as overly influenced by driver input," *id.* at 28a. Indeed, the panel noted that "some CU personnel shared this assessment." *Id.* at 29a; see also *id.* at 24a. Thus, the court concluded, a reasonable jury could conclude that "CU's failure to address this deficiency"—a deficiency that was part and parcel of the manipulability of CU's tests—was a purposeful avoidance of the truth. *Id.* at 29a.

CU petitioned for rehearing *en banc*, asserting that the majority had held that "independent examination" simply does not apply at summary judgment. CU Pet. for Reh'g En Banc 1-2, 4-5. The court of appeals denied rehearing *en banc* over a dissent by Judge Kozinski. Pet. App. 48a. In denying rehearing, the majority filed an amended opinion that highlighted the fact that it had indeed conducted a full, independent review of the record. Compare *id.* at 13a-16a with 292 F.3d at 1198-1200. Judge Graber added a separate concurrence that did the same thing. See Pet. App. 30a. CU now seeks review of that amended opinion.

REASONS FOR DENYING THE PETITION

Given the standards articulated in *Anderson* and again in *Masson*, this case is, at bottom, a fact-bound, credibility-dependent dispute about the sufficiency of the evidence. As explained in *Anderson*,

> [W]here the factual dispute concerns actual malice,

> clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56; accord *Masson*, 501 U.S. at 521.

CU's petition tries to make it seem that something far greater is at stake, including (1) whether "independent review" can be conducted at the summary judgment stage based only on the plaintiff's evidence, Pet. 17-22; and (2) whether the First Amendment permits a finding of purposeful avoidance based on a defendant's "disagreement with the government," *id.* at 26-30. However, as shown in detail below (in Sections I and II), each of these assertions, which form the heart of CU's petition, is based upon an obvious mischaracterization of the majority's opinion. Accordingly, these questions simply are not presented by the holdings below. Nor is there any basis for CU's claim that the lower courts are sufficiently confused about the summary judgment standard to warrant this Court's revisiting the rules laid down in *Anderson* and unanimously reaffirmed in *Masson*.

I. PETITIONER'S ARGUMENTS ABOUT APPROPRIATE SUMMARY JUDGMENT STANDARDS ARE PREMISED ON A MISREADING OF THE PANEL'S DECISION.

CU's arguments for review of the majority's application of the summary judgment standard badly distort the opinion below. And those distortions lead CU and its *amici* to make exaggerated and erroneous claims about the decision's potential to "chill core free speech." Pet. 24.

A. The Court Of Appeals Neither Created Nor Exacerbated A Circuit Conflict Because It Did Not Hold That No Independent Examination Is Required, Or That A Court Must Ignore A Media Defendant's Evidence On Summary Judgment.

This Court's cases have twice dealt comprehensively with the proper standard to apply at summary judgment on a question of actual malice. As explained in *Anderson*, in a "*New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." 477 U.S. at 255-56. In practice, as this Court reiterated in *Masson*, this means that the appellate court must first "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." 501 U.S. at 520; accord *Anderson*, 477 U.S. at 255. Then, conducting what *New York Times* called an "independent examination," 376 U.S. at 285, the court must determine for itself whether the totality of that appropriately-construed evidence is enough for a reasonable jury to find actual malice by clear and convincing evidence. *Anderson*, 477 U.S. at 254-56; see *Masson*, 501 U.S. at 513, 520-25 (reviewing evidence in the light most favorable to the nonmoving party to determine whether it "suffices" to show actual malice). Although CU buries the point in a footnote, it ultimately acknowledges that *Masson* (which reiterated and applied the standards from *Anderson*) sets forth the appropriate standards at the summary judgment stage. Pet. 24 n.6. There can be no doubt that the majority applied those standards here, and did so correctly.

1. In several places, CU suggests that the majority failed to conduct any independent review at all. Pet. 12, 17, 18, 22, 25. But that is obviously false. In applying the *Anderson/Masson* standards, the court of appeals expressly recognized that the appellate court "must independently examine

the record when reviewing the grant of summary judgment." Pet. App. 14a; *id.* at 15a, 16a, 30a (Graber, J., concurring in part) ("the independent examination rule applies at the summary judgment stage"), cf. *id.* at 39a (Ferguson, J., dissenting) (acknowledging the majority recognized the applicability of independent examination). Thereafter both Judge Tashima and Judge Graber separately concluded, after conducting their independent examinations, that the evidence created a jury question about CU's actual malice. *Id.* 16a, 35a (Graber, J.).

In short, CU's suggestions that the majority failed to conduct an independent examination are flatly contradicted by the opinions below. For the same reason, the decision below accords with the uniform approach of other courts—namely, that an independent review is required at the summary judgment stage.[6]

2. CU's principal attack on the panel's decision—and the centerpiece of its case for this Court's review—rests on yet another clear misreading of the majority's opinion. CU claims the court of appeals "refus[ed]" to consider all of the evidence in the case—*i.e.*, the evidence submitted by CU as well as Suzuki's evidence. Pet. 18; see also *id.* at 11, 13. Its *amici* in the media repeat the same claim. Br. Amici Curiae of ABC, Inc. et al. ("ABC Br.") at 7-8. Although this claim may help CU undermine the court of appeals' credibility with the public at large, the accusation is demonstrably false.

Nowhere did the court state that it was considering *only* Suzuki's evidence. Judge Graber clearly explained that the majority was "employ[ing] [a] standard of review" under which it "examine[d] independently *the entire record*." Pet. App.

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[6] *E.g.*, *Wells* v. *Liddy*, 186 F.3d 505, 520 (4th Cir. 1999); *Lytle* v. *City of Haysville, Kan.*, 138 F.3d 857, 862 (10th Cir. 1998); *Lundell Mfg. Co.* v. *Am. Broad. Cos.*, 98 F.3d 351, 358 & n.2 (8th Cir. 1996); *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988); *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1090-91 (3d Cir. 1988); *Zerangue* v. *TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *see also* cases cited *infra* note 8.

30a (emphasis added). Similarly, in analyzing the evidence, both Judge Tashima and Judge Graber repeatedly referred to "the record," without any suggestion that CU's evidence was being excluded. Pet. App. 14a, 15a (quoting *Anderson*, 477 U.S. at 255-56), 20a n.12, 30a (Graber, J.), 31a (Graber, J.). Indeed, Judge Tashima's opinion repeatedly cited and analyzed evidence that CU had presented in its defense. *E.g.*, *id.* at 28a.[7]

The decision below, therefore, is fully consistent with the cases cited by CU in support of the proposition that an appellate court must review the entire record, not just the plaintiff's evidence.[8] There is, accordingly, no conflict in the lower courts on this issue.

3. Significantly, CU does *not* accuse the majority of having

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[7] In the court of appeals, CU similarly accused Suzuki of contending "that the only record evidence a court may consider and must accept is that which Suzuki points to." CU Ct. App. Br. 38; *id.* at 37, 39. But Suzuki made clear that, "unlike the district court's analysis in this case (and contrary to CU's misrepresentation of Suzuki's position), the evidence must be aggregated and considered in its 'totality.'" Suzuki Ct. App. Reply Br. 5; *see also id.* at 3.

The fact that the majority reviewed the entire record also answers CU's assertion that reviewing the whole record was "outcome determinative" in this case because only those judges who did so (*i.e.*, the dissenters) voted for CU. Pet. 18. The difference in result is more plausibly explained by the dissenters' unwillingness to view the evidence through the evidentiary prism established by *Anderson* and *Masson*. *See infra* note 9.

[8] Pet. 19-21 (citing *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir. 1986); *Contemporary Mission, Inc.* v. *New York Times Co.*, 842 F.2d 612 (2d Cir. 1988); *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168 (2d Cir. 2001); *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932 (2d Cir. 1980); *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir. 1988); *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595 (D.C. Cir. 1988); *Price* v. *Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989); *Secrist* v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989); *Herbert* v. *Okla. Christian Coalition, Inc.*, 992 P.2d 322 (Okla. 1999); *Perez* v. *Scripps-Howard Broad. Co.*, 520 N.E.2d 198 (Ohio 1988)). Notably, nearly all of these cases were decided before *Masson*. Accordingly, if there ever were a circuit split on this point (and we are aware of none), it was resolved by *Masson*.

erred when it rejected CU's main argument below—namely, that in a First Amendment case on summary judgment, the evidence need *not* be viewed in the light most favorable to the nonmoving party, but in fact can be weighed in favor of the media defendant. CU Ct. App. Br. 7, 38; Pet. App. 19a (recognizing CU had urged the court to weigh the evidence). Instead, CU now recognizes that on "summary judgment, [the court] must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and the *weight* to be accorded particular evidence." Pet. 24 n.6 (emphasis added); see also *id.* at 18 n.4 (abandoning argument that independent examination is from the court's perspective, rather than that of a reasonable jury); ABC Br. 9, 11, 12 (acknowledging that "factual disputes," "reasonable inferences" and "'questions [of] credibility'" must be resolved in Suzuki's favor).[9] This concession is both appropriate and dispositive: No post-*Masson* appellate decision of which we are aware has weighed evidence or made credibility determinations under the guise of conducting an "independent review" at the summary judgment stage. See Pet. 19-21 (citing cases).[10]

CU's tacit admission on this point is important because it

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[9] The dissenting judges, by contrast, repeatedly indicated that they were viewing the evidence in the light most favorable to *CU. E.g.*, Pet. App. 42a (Ferguson, J.) (resolving in CU's favor the disputed issue of CU's motivation for adopting a new test); *id.* at 60a-61a (Kozinski, J.) (same); see also *id.* at 40a (Ferguson, J.) (opining that CU had good motives because it is a testing organization).

[10] Although CU does not press the point in its petition, it has previously argued that a passage from *Liberty Lobby* v. *Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir. 1987), holds that the normal rule that evidence presented on a motion for summary judgment is construed in favor of the nonmoving party does not apply where actual malice is concerned. *Id.* at 1293. As CU apparently recognizes, however, any such suggestion (if it were ever a fair reading of the D.C. Circuit's decision) has been eliminated by *Masson*'s reaffirmation of the principle that the normal summary judgment standards apply when actual malice is at issue. 501 U.S. at 520. Thus, even if there had once been a conflict on this point, *Masson* resolved it. *See* Suzuki Opp'n to Pet. for Reh'g at 11-12, 13.

disclaims the central argument of the Ninth Circuit dissenters and, indeed, CU's own *amici* here. In his dissent from denial of rehearing *en banc*, for example, Judge Kozinski argued that independent examination requires the reviewing court at the summary judgment phase to "weigh[] the evidence," Pet. App. 52a, thereby contravening the usual summary judgment test. Judge Ferguson appears to have taken the same approach, *id.* at 41a-42a, as do CU's *amici*, ABC Br. at 9. However, as CU now seems to recognize, that is plainly wrong. As the Court put it in *Masson* (in a statement the *amici* simply ignore, see *id.* at 6-7 n. 4), "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility *and of the weight to be accorded particular evidence*." 501 U.S. at 520 (emphasis added).[11] Allowing a judge to weigh evidence at the summary judgment stage would circumvent the Seventh Amendment's guarantee that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States." And it would be an enormous, judicially-crafted exception to Rule 56(c).[12]

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[11] Accord *Anderson*, 477 U.S. at 249 ("the judge's function is not himself to weigh the evidence"); *id.* at 255 ("the weighing of the evidence" is a "jury function[], not th[at] of a judge"); Pet. App. 15a ("contrary to the dissent's suggestion, the independent examination rule of *New York Times* is consistent with our well-established procedural rules governing review of summary judgment motions"). The Court in *Masson* specifically "declined" to engage in such weighing there. 501 U.S. at 521. And *none* of the decisions cited by the *amici* on this issue, *see* ABC Br. 9 n.10, claimed the right to weigh the evidence on a motion for summary judgment. To the contrary, one of those cases expressly held that "trial judges are to refrain from weighing evidence at the summary judgment stage." *Welch* v. *Am. Publ'g Co.*, 3 S.W.3d 724, 730 (Ky. 1999).

[12] *Amici* and the dissent fear the media's being forced to defend at trial a case in which a verdict for the plaintiff would not survive post-verdict judicial review. But they appear to misunderstand the panel's proper recognition that the *application* of independent review at summary judgment necessarily differs from post-trial review because the body of evidence is different. Pet. 11-12 (discussing Pet. App. 32a (Graber, J.)); ABC Br. 9-10, 13-17. Post-verdict, the court accepts, at a minimum, all factual find-

B. Adhering To Settled Summary Judgment Standards In This Case Would In No Way Spell "The Death Of Consumer Ratings."

Contrary to the arguments of CU and its supporters, allowing this case to proceed to trial will hardly herald "the death of consumer ratings," Pet. App. 49a, or otherwise chill legitimate speech, Pet. 24-26; ABC Br. 3-4, 16. For one thing, those concerns are largely based on a reading of the panel's decision that is, as explained above, erroneous at best. But these concerns are misguided for other reasons as well.

1. Much of the concern about the potential impact of a trial in this case hinges on an assumption that CU's statements are either non-actionable statements of opinion or are, in fact, true. See Pet. App. 58a-60a. CU, however, does not dispute that its summary judgment motion did not rest on either of these grounds, but instead rested solely on the issue of actual malice.[13]

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ings that the jury must have made to support the verdict. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 690 (1989). At summary judgment, by contrast, the evidence on all disputed issues is viewed in a light favorable to the non-moving party. *Masson*, 501 U.S. at 520. To equate the record on summary judgment with the record on trial denigrates the essential role of the jury in weighing evidence and assessing credibility.

The concern about purported asymmetry, moreover, assumes that *Bose* allows a reviewing court to weigh the evidence, not only after a bench trial (as in *Bose*), but after a jury trial. *Anderson*'s general statement that "[c]redibility determinations [and] the weighing of the evidence ... are jury functions, not those of a judge," 477 U.S. at 255, casts substantial doubt on that assumption. But whether or not a court can appropriately weigh the evidence after a jury trial, and whatever other uncertainties may exist as to the standard to be applied on post-verdict review, those issues provide no basis for revisiting the clear summary judgment standard adopted in *Anderson* and reaffirmed in *Masson*.

[13] For this same reason, the *en banc* dissent is incorrect in suggesting that CU's "disclosure" of its testing methodology insulates CU from a finding of actual malice. Pet. App. 56a-59a. Disclosure is relevant only where a statement is one of opinion rather than fact. Furthermore, as the

In most cases, media defendants surely will believe their statements are demonstrably true or are statements of opinion. They will, accordingly, seek summary judgment on these grounds as well and, if they prevail, will avoid a jury trial.

2. Concerns about the burdens of litigation also ignore the fact that a media organization, when it learns of compelling evidence that its employees have published a false statement, can retract the false statement and, if necessary, discipline the employees involved. That is what the *New York Times* and *NBC News* have done in the face of recent scandals involving employees who violated the public trust.[14] There is no evidence that such responsible actions have "chilled" protected speech.

3. The policy arguments advanced by CU and its *amici* also ignore another important goal of this Court's First Amendment jurisprudence: to avoid undue interference with the application of State laws designed to protect the public (including businesses and their employees) from false and malicious statements. As Chief Justice Warren noted long ago, "the First Amendment does not include absolute license to destroy lives or careers." *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring in result). Nor does it include an absolute license to destroy consumer products and, with them, the "lives and careers" of those who make and sell them. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). And that, of course, is why this Court has consistently held that '[t]hose who publish ... falsehoods with the requisite culpability ... are subject to liability, *the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury.*" *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979)

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evidence shows, CU's tests were both manipulable and rigged—facts that CU certainly did not disclose.

[14] *See* D. Barry, *Correcting the Record*, N.Y. Times, May 11, 2003, at A1; J. Hall, *Chief of NBC News Quits in Wake of Rigged Crash*, L.A. Times, Mar. 3, 1993, at A1.

(emphasis added).

In this case, Suzuki seeks nothing more than an opportunity to allow a jury to decide whether CU's false and damaging statements were made with "the requisite culpability." To allow Suzuki that opportunity does not impermissibly infringe on CU's right of free expression, precisely because (as the majority below held) a jury could conclude by clear and convincing evidence that CU acted with actual malice. When the evidence shows that an organization rigs its testing, lies about the test, refuses to correct its mistakes in the face of criticism from government regulators and republishes its false statements, a jury trial is the appropriate response in our system of justice.

4. Finally, contrary to the suggestion by CU and its *amici* (and by the Ninth Circuit dissenters), there is no reasonable likelihood that revisiting the *Anderson/Masson* standards could affect the outcome of this case. As Judge Graber properly recognized, Suzuki's case against CU turns largely on the credibility of CU's employees and, in particular, Messrs. Landau, Pittle and Knoll. Pet. App. 32a n.1 ("In this case, the credibility of a number of CU's employees is of paramount importance to the 'actual malice' inquiry."). And as Judge Kozinski and the media *amici* acknowledge, *id.* at 51a; ABC Br. 9, 11, 12, credibility determinations clearly must be left to the jury. Accordingly, summary judgment is singularly inappropriate in this case.

First, as noted above, it was Landau, CU's Editorial Director, who announced at the test track that, if CU's test drivers could not "roll" the Samurai, Landau would find someone who could. Pet. App. 5a. Landau claims that he never made the statement and, alternatively, that *if* he did, it was made in jest. ER 1437. But sworn testimony by Denison shows that Landau made the statement and made it as a threat, not a joke. Moreover, Landau was understood to "suggest to someone from the auto test division to find a result." ER 1188, 1190.

This dispute as to whether Landau made the statement, and if he did, what his intent was, is precisely the sort of disputed credibility determination that should be resolved by a jury and accordingly, at this stage, must be resolved in favor of Suzuki. *Masson*, 501 U.S. at 520 (the reviewing court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence"); *Anderson*, 477 U.S. at 255. Thus, for CU to avoid a jury trial, the Court would not only have to reject the *Anderson/Masson* standard. It would also have to jettison the principle, derived from the Seventh Amendment and embodied in Rule 56, that credibility determinations *must* be left to the jury.[15]

The same is true of another critical issue, namely the intent of Mr. Pittle (CU's Technical Director) when, on the Samurai's 47th trip through CU's course, he finally got the wheels of the Samurai to lift up. Pittle asserts that he merely wanted to see how a small SUV handles. Pet. App. 5a. Suzuki's evidence, by contrast, demonstrates that Pittle, in wrenching the vehicle the way someone would do if he were trying to make the vehicle tip, ER1692-95, was responding to Landau's expressed desire to manufacture a Samurai "roll." See *supra* at 5-6. And the conclusion that Pittle's goal was to tip the Samurai is confirmed by the overjoyed reactions of CU's other personnel on a videotape made well *before* CU knew that its conduct would be the subject of a lawsuit. See *supra* at 6-7. In short, Pittle's intent is yet another disputed credibility determination that must be resolved by a jury.

This is particularly so in light of Pittle's subsequent misrepresentations about the Samurai testing. See *supra* at 9-10. A reasonable jury could conclude that, when Pittle lied at the

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[15] Nor can this statement be dismissed as simply an indication of "bias." Pet. App. 62a (Kozinski, J.). This is not just an indication that Landau disliked the Samurai or Suzuki. It is evidence from which a reasonable jury could conclude that Landau *intended* to have the Samurai tipped at all costs, even if a tip-up could only be accomplished by a rigged test.

press conference by saying the test was "benign"—and compounded that misrepresentation with a pantomimed and equally false demonstration of *gentle* steering he supposedly employed when driving the Samurai, ER 2200 (Video Excerpt L)—he did so in an effort to bolster the false claim that the Samurai "easily" tips up, and to mask his own complicity in the test rigging. Again, this is a classic issue of credibility that must, under any conceivable Rule 56 standard, be resolved by a jury.

The same is true as to the intent of Mr. Knoll (head of CU's auto testing division) in designing and implementing the new course that formed the basis for CU's subsequent criticisms of the Samurai. Was his intention, as Knoll has claimed and the *en banc* dissent assumes, simply to create a more "challenging" course that could be used to determine whether the Samurai was less stable than other comparable vehicles? Pet. App. 49a; ER1360-61; SER 69. Or was it, as Suzuki's evidence shows, to create a maneuver that would allow CU's test drivers to use stunt-like steering when driving the Samurai, without being detected, and therefore to make the Samurai *appear* more prone to rollover than other vehicles? See *supra* 5-6, 8, 11; ER 559-60, 620.

If a jury resolved these credibility issues against CU and concluded that CU acted as Suzuki's evidence reveals, no amount of "weighing" could overcome the jury's resolution of these factual disputes in Suzuki's favor.

II. PETITIONER'S ARGUMENTS ABOUT "PURPOSEFUL AVOIDANCE" ARE LIKEWISE BASED ON A MISREADING OF THE PANEL'S DECISION.

CU also asserts that the court of appeals' holding on "purposeful avoidance" would permit CU to be held liable merely for "disagreement with [the] government," Pet. 28, and that the court of appeals erred in its analysis of CU's financial motive. These arguments find no basis in the panel's opinion.

1. Under *New York Times*, a plaintiff may demonstrate actual malice by proving that the publication was made (1) "with knowledge that it was false"; *or* (2) "with reckless disregard of whether it was false or not." 376 U.S. at 279-80. Under the reckless disregard theory, liability will attach for "purposeful avoidance of the truth." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 692 (1989).

Based on its review of CU's evidence, the court of appeals (after rejecting portions of Suzuki's argument on this point, Pet. App. 23a-28a), determined that one aspect of Suzuki's claims of purposeful avoidance should reach the jury. Specifically, the court found a jury issue as to whether CU ignored widespread criticism that its rollover tests, as the NHTSA put it, were so manipulable or "driver-dependent" that "probably any light utility vehicle could be made to roll over under the right conditions and driver input," and that the absence of instrumentation made it impossible to reproduce those tests. ER735; Pet. App. 10a, 288a. As the court of appeals recognized, CU's testing was also criticized on this basis by the British Department of Transport, and even some CU employees believed the tests were driver-dependent. *Id.* at 24a. The court of appeals properly recognized that this critique was sufficiently damning that CU's utter refusal to address it could be the basis of a jury finding of purposeful avoidance. *Id.* at 24a-25a.

CU's challenge to this analysis distorts the court's opinion in two respects. First, CU contends that the court "found 'purposeful avoidance' based on a disagreement with a government agency." Pet. 28; see ABC Br. 17-18 (repeating this assertion). This characterization is simply inaccurate. The basis for potential liability was not a "disagreement." Rather, it was CU's failure even to consider this serious and technical critique of its testing methodology. Such willful blindness to a specific criticism is not a "well-articulated disagreement," Pet. 2, but is instead classic "purposeful avoidance," *Harte-*

Hanks, 491 U.S. at 692.[16]

Second, as part of its argument that the majority failed to consider the entire record, CU incorrectly asserts that the court "recognized but deemed irrelevant" the fact that CU issued a response to the NHTSA report. Pet. 27. But in reality, the majority expressly discussed CU's response to the NHTSA report, Pet. App. 25a-28a, and indeed relied upon it as a basis for rejecting certain of Suzuki's arguments about purposeful avoidance. The court recognized, however, that with regard to the concern about driver-dependency, CU turned a blind eye. See generally Pet. App. G, I (CU's published and internal reaction to NHTSA). That was the basis of the court's holding, not a simple "disagreement" with the government.

Because this case is thus not really about "disagreement with the government," the policy concerns outlined by the dissent, Pet. App. 66a, and CU's *amici*, ABC Br. 18-20, are not implicated here. Of course the media, like anyone else, may disagree with the government. But fabricating test results, and blinding oneself to a critique of the flawed testing that enabled those results, hardly constitutes a protected "disagreement" with the government. And the fact that CU conducted the tests itself, and fabricated the very news that it purported to report, distinguishes this case from the examples cited by CU's *amici*. See ABC Br. 19-20.

2. Nor does the question of "financial motive" merit this Court's attention. Pet. 29-30. Contrary to CU's argument, this Court explained in *Harte-Hanks* that evidence of a media

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[16] For the same reason, the *en banc* dissent is incorrect to assert that CU's choice of testing methods is "just one side of a long-running debate over how to test rollover propensity most effectively," as purportedly evidenced by subsequent federal legislation. Pet. App. 66a. Moreover, the dynamic rollover tests proposed in the wake of this legislation would use a mechanical "steering controller" for the very purpose of eliminating the manipulability inherent in CU's test. 67 Fed. Reg. 62528, 62538 (Oct. 7, 2002).

organization's financial motive *is* valid circumstantial evidence of actual malice. 491 U.S. at 668. Thus, it is clear that motive may be a relevant factor even if, taken by itself, it "cannot provide a *sufficient* basis for finding actual malice." *Id.* at 665 (emphasis added). And, that is precisely what the court of appeals held here. Pet. App. 22a ("While CU is correct that financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry. *See Harte-Hanks*, 491 U.S. at 668...").

CU's suggestion that the court erred in finding that a defendant's financial condition can be relevant to actual malice, Pet. 30, thus flies in the face of *Harte-Hanks*. And CU's apparent effort to obtain a reexamination of the evidence on this point, *id.* ("here there is absolutely *no* evidence from which one could reasonably infer that CU lied because of financial considerations"); see also ABC Br. 17-18 (arguing that the court put "undue reliance" on this factor), provides no basis for certiorari. Sup. Ct. R. 10.

III. GIVEN ITS INTERLOCUTORY POSTURE, THIS IS NOT AN APPROPRIATE CASE IN WHICH TO ADDRESS THESE ISSUES IN ANY EVENT.

Even if there were a legitimate need to revisit the First Amendment standards applicable to suits against media defendants, this is not an appropriate case in which to do so—aside from the fact that it does not really present the issues CU claims.

That is because this case comes to the Court in an interlocutory posture, and it is well-settled that this Court virtually always "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). As the Court explained long ago, certiorari jurisdiction is "to be exercised sparingly," and therefore, lack of finality may "of itself alone" provide "sufficient ground for the denial" of certiorari. *Hamilton-Brown*

Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, having concluded that a reasonable jury could determine by clear and convincing evidence that CU's statements about the Samurai were made with "actual malice," the court of appeals remanded to the district court for further proceedings, including a trial on Suzuki's claims. Thus, the decision of the court of appeals is interlocutory, and not yet "ripe for review" by this Court. *Bhd. of Locomotive Fireman* v. *Bangor & Aroostock*, 389 U.S. 327, 328 (1967) (per curiam).

Nor is this a case in which the specific summary judgment issue sought to be presented could arise *only* in an interlocutory posture. If another court applied the standard sought by CU (to the extent an alternative standard can be gleaned from CU's petition), and if summary judgment were *granted* to the defendant and affirmed on appeal, the plaintiff would then have a final judgment from which to seek review in this Court.[17]

Moreover, the considerations supporting the general rule against review of interlocutory appeals apply with full force here. Of particular relevance is the canon of constitutional avoidance, by which "[t]he Court will not 'anticipate a ques-

[17] This case also does not fall into one of the narrow categories of cases appropriate for interlocutory review when they arise from State courts, *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479-83 (1975), a fact that, although not dispositive, strongly indicates that review is inappropriate. Contrary to CU's suggestion, Pet. 18, this is not a case in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case"—the third *Cox* category. 420 U.S. at 481. If Suzuki prevails at trial, CU may renew its First Amendment argument at that time, including any issues peculiar to summary judgment. R. Stern et al., *Supreme Court Practice* § 2.3, at 75 (8th ed. 2002) (citing cases).

Nor is this a case in which a decision to adopt new First Amendment standards would "be preclusive of any further litigation on the relevant cause of action." *Cox Broad.*, 420 U.S. at 482-83. As shown above (at 23-25), unless the Court were to reject the prohibition on courts making credibility determinations—a prohibition CU does not challenge—a decision to impose more press-friendly summary judgment standards would hardly guarantee victory to CU.

tion of constitutional law in advance of the necessity of deciding it.'" *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). As this Court has repeatedly recognized, "it is precisely the policy against unnecessary constitutional adjudication that demands strict application of the finality requirement." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 75 (1987) (Stevens, J., dissenting). Just last Term, several members of this Court recognized this principle when the Court dismissed a writ of certiorari as improvidently granted—in a case, like this one, involving allegations that First Amendment rights had been violated by an interlocutory ruling. See *Nike, Inc.* v. *Kasky*, 123 S. Ct. 2554, 2558 (2003) (Stevens, J., concurring in dismissal of writ because of the "difficult First Amendment questions raised in this case").

Here, awaiting final judgment would prevent the Court from unnecessarily deciding issues of constitutional law, including sensitive issues about the extent to which the First Amendment can override both the Seventh Amendment and State law.[18] Awaiting final judgment is therefore the appropriate course in this case, even if the Court believed any of the issues raised in the petition were otherwise worthy of review.

CONCLUSION

The petition for a writ of certiorari should be denied.

[18] To address any of the issues raised by CU, the Court would first have to consider whether the "actual malice" requirement even applies to an action for product disparagement. This issue—which was preserved below, Pet. App. 17a n.11—was expressly left open in *Bose*, and this Court has not yet addressed it. If certiorari were granted, Suzuki would likely raise that issue as an alternative ground for affirmance.

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Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORP.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

The petition and *amicus* briefs demonstrated that the "independent examination" rule of *New York Times* v. *Sullivan* serves a vital role in effectuating the First Amendment's protections on summary judgment. As Suzuki concedes, other circuits "uniform[ly]" apply the "independent examination" rule on summary judgment just as they do after trial (BIO 17), such that "an appellate court must review the entire record, not just the plaintiff's evidence" (*id.* 18). *All* of the thirteen judges who have applied that standard have found that Suzuki's claim fails First Amendment scrutiny because the isolated evidence Suzuki wrenches from context is completely overborne by the record as a whole. As petitioner shows herein, the panel majority avoided that conclusion only by holding that "independent examination" at the summary judgment stage merely entails searching the record for evidence supporting the plaintiff, a rule that chills expression and thereby threatens "the future of all independent product reviews" (*Protect a Consumer Ally*, L.A. Times, Aug. 27, 2003, at 12), which can be a matter of "life-or-death" (Pet. App. 64a (Kozinski, J.)). See generally Insur. Inst. Br.; Pet. App. 44a (Ferguson, J.) (recognizing circuit conflict).

Review of the circuit conflict is appropriate now (contra BIO 28-30) because the court of appeals resolved CU's entitlement to summary judgment. Suzuki cannot and does not contend that a trial on remand will illuminate the questions presented or raise issues meriting certiorari. As illustrated by *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), which arose in the identical posture, this Court's practice in federal cases is to grant certiorari if, as here, the federal question presented has been resolved below.[1] Review is particularly appropriate now

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[1] See, *e.g.*, *Dastar Corp.* v. *20th Century Fox*, 123 S. Ct. 2041 (2003); *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Franchise Tax Bd.* v. *Hyatt*, 123 S. Ct. 1683 (2003); *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); *United States* v. *White Mountain Apache Tribe*, 537

because the First Amendment's role in this context is to protect speakers by avoiding the wasteful burdens of unwarranted trials. If the trial occurs, that protection is lost. See Media Br. 16-17.

Suzuki also ignores that this case presents the perfect opportunity for this Court to fulfill its "vitally important" role (*Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984)), in elucidating the application of the actual malice standard through "case-by-case adjudication" (*Harte-Hanks*, 491 U.S. at 686). This case is the polar opposite of *Nike* v. *Kasky*, 123 S. Ct. 2554 (2003), a *state court* case in which *no* record had been developed notwithstanding the fact that the question presented – whether the petitioner's statements were "commercial speech" – turned on the as-yet-unexplored nature and context of those statements. Not only is the summary judgment record here singularly well developed, but the lower courts produced five opinions exploring how the questions presented should be resolved.[2]

I. Certiorari Is Warranted To Review The Ninth Circuit's Holding That, On Summary Judgment, "Independent Examination" Only Permits The Court To Review The Record For Evidence Supporting The Plaintiff.

1. As is the practice in defamation and libel litigation, after exhaustive discovery, CU moved for summary judgment on the ground that, assuming *arguendo* that its published statements were false, it had not acted with "actual malice." The issue is accordingly whether, even assuming that CU's tests did not support its opinion that the Suzuki Samurai presents a serious rollover risk, the record could support a finding of clear and

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U.S. 465 (2003); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). Contra BIO 29 n.17 (erroneously relying on state court finality standard of 28 U.S.C. 1257).

[2] The *New York Times* standard obviously applies here. Contra BIO 30 n.18. Whatever the rule when a *business* disparages a *competitor*, when a publisher such as CU addresses a public figure or matter of public controversy, it does not receive lessened First Amendment protection merely because its speech relates to a business or a commercial product.

convincing evidence that CU acted with reckless disregard of the truth in 1996 (after the Samurai was no longer even being sold) when it restated that testing in 1988 had disclosed that the Samurai has a "propensity to roll over" and "easily rolls over in turns." Pet. App. 34a-35a (Graber, J.). *Contra* BIO 8-11 (contesting other statements by CU that the court of appeals deemed not actionable). Suzuki speculates that CU – the nation's most respected consumer testing organization – engaged in a massive conspiracy, abandoning the organization's principles and risking its very existence, in order to undermine the reputation of an SUV that was produced by a manufacturer of cars that CU had repeatedly praised. Eschewing record citations for rhetoric and speculation derived from its own evidence in isolation, Suzuki ignores the undisputed facts found by the district court and not contested by Suzuki on appeal that preclude a jury from finding by clear and convincing evidence that CU spoke with actual malice[3]:

- In contending that CU was hostile to the Samurai or tested it expecting it to tip up, Suzuki all but ignores (just as the Ninth Circuit deemed entirely irrelevant) that CU had good reasons to be seriously concerned that the Samurai was hazardous. Suzuki fails to mention prominent reviews finding a rollover propensity in the *New York Times*, the *Washington Post*, and elsewhere. Suzuki only barely acknowledges the extensive NBC-TV report finding that the Samurai dangerously tips up, and (except for an inscrutable reference to post hoc analysis of the size of a bump (see BIO 13 n.5)) skips over the fact that CU's test Samurai rolled onto its side during normal driving. See Pet. 6.

- Suzuki relies on inferences it would draw from alleged statements at the test facility and the fact that staff cheered when the Samurai tipped up while driven by Dr. Pittle. BIO 6-7. "But even if CU's preconception were entirely arbitrary, these fleeting remarks – three of which are no more than inane

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[3] At the summary judgment stage, such findings of undisputed fact, "although not required, frequently are helpful." Wright & Miller, Federal Practice & Procedure § 2716, at 280-81 (2000). Contra BIO 3 & n.1.

schadenfreude – would still be insufficient to support a finding of actual malice" (Pet. App. 62a-63a (Kozinski, J.)) because Suzuki ignores the uncontested *direct* evidence, in the form of CU's voluminous research, testing, and editorial files as well as sworn affidavits from the employees involved, that no CU employee was in any respect instructed to skew the testing of the Samurai. Compare Pet. App. 126a ¶¶ 158-59 with BIO 7 (baldly asserting that CU "manufactur[ed]" the tip-ups and that a CU employee made "threats to the testing staff"). Suzuki's failure to mention the undisputed fact that the staff also cheered on runs by Dr. Pittle (who is not a professional driver) in which *no* tip-up occurred demonstrates how profoundly misguided it is for the court to consider only one side's evidence in isolation.

• While citing criticism of CU's test methodology after the 1988 *Consumer Reports* review (see BIO 11), Suzuki ignores not only that NHTSA found that CU's tests raised concerns, but also the many other events that *confirmed* the conclusions that CU had reached in 1988 before it made the 1996 statements in question – *e.g.*, that Suzuki was sued by several states and settled; that a federal court sanctioned Suzuki for *deliberately concealing* the risk of rollovers; that a British consumer testing organization found the same rollover risk; and that Suzuki had not sued CU in the eight years since the initial review. Suzuki also absurdly asserts that "expert testimony reveals that a tip-up of the Samurai could *only* be achieved deliberately" (BIO 8 (emphasis added)), ignoring the more than 200 people who *died* in Samurai rollovers (who presumably did not tip the car "deliberately"), as well as its many settlements of rollover suits. See generally Pet. 8.

• Finally, this case does not come close to a fact-bound fight over "credibility." Contra BIO 23-25. The credibility of the publisher is at issue in *every* libel and defamation case, such that if Suzuki is right, such disputes will *always* preclude summary judgment. Here, there is only one genuine credibility dispute: whether, as a disaffected former CU employee claims, Irwin Landau actually stated to someone, "If you can't find someone to roll this car, I will." Pet. App. 5a. Assuming for purposes of summary judgment that this statement occurred, there is no

evidence that it was intended or taken seriously. To the contrary, the district court found it *undisputed* that no CU employee was instructed to manipulate the testing. Pet. App. 126a ¶¶ 158-59. It therefore cannot reasonably be said, even crediting this testimony, that there is "*clear and convincing*" evidence that CU acted with reckless disregard for the truth. To the contrary, as thirteen judges have found, the evidence on the whole is "one-sided" in CU's favor.

2. The Ninth Circuit thus erred as a matter of law when it considered Suzuki's evidence in isolation. Suzuki attacks a straw man when it calls "obviously false" the claim "that the [Ninth Circuit] majority failed to conduct any independent review *at all*." BIO 16 (emphasis added). In fact, as petitioner now shows, the Ninth Circuit held that on summary judgment, although the "independent examination" rule nominally applies, it merely permits the court to review the record as a whole for evidence supporting the non-moving party. This holding directly conflicts with the articulation and application of the rule by other circuits. See Pet. 19-22.

a. Although Suzuki contends that the Ninth Circuit applied the "independent examination" rule just as it would have after trial (see BIO 17), each statement it cites is either taken out of context or offers Suzuki no support:

First, Suzuki's quotation of the panel opinion omits its actual holding. The court explained, "*While it is true that* we must independently examine the record when reviewing the grant of summary judgment" (Pet. App. 14a (added emphasis is on language omitted by Suzuki)), that examination is extremely limited on summary judgment: "Under the independent examination rule, we 'exercise our independent judgment' in evaluating the lower court's opinion, rather than granting it any deference. In other words, *we review the district court's decision de novo*." *Id.* (emphasis added). That rule eviscerates "independent examination" because the court already "review[s] de novo the trial judge's determination * * * in every case" on summary judgment. *Id.* 51a (Kozinski, J.).

Second, nothing on Pet. App. 15a & 16a, which Suzuki cites without elaboration, supports Suzuki's position. To the

contrary, the Ninth Circuit there held that it "applies the *normal* summary judgment standards to the issue of actual malice" (Pet. App. 15a (emphasis added)) and that CU could not secure summary judgment because Suzuki could prevail on a "plausible" reading of *its* evidence (*id.* 16a). Most important, the majority acknowledged – but expressly refused to follow – the cases that CU had cited in which courts had applied the "independent examination" rule as articulated in *New York Times*, holding that these cases were inapposite because "all involve[d] the review of a judgment rendered *after trial*." *Id.* (emphasis added). Pet. App. 15a-16a n.10. That was precisely Suzuki's argument below. Suzuki C.A. Reply Br. 5 (arguing that cases which CU cited, and Ninth Circuit subsequently refused to follow, "articulate the standard for judicial review after a *verdict*, not at summary judgment" (emphasis in original)).

Third, Suzuki's quotation of Judge Graber once again omits her conclusion. Judge Graber wrote, "*Although* the independent examination rule applies at the summary judgment stage" (Pet. App. 30a (added emphasis is on language omitted by Suzuki)), "[t]here are good reasons why courts must apply the independent examination rule *differently* in the summary judgment context than when reviewing a judgment entered after a full trial" (*id.* 32a). She reiterated that "we must apply the independent examination rule *differently* than we would if we were reviewing an actual-malice finding made after a full trial" (*id.* 32a-34a (emphases added)).

Fourth, Suzuki's claim that the dissent "acknowledg[ed] [that] the majority recognized the applicability of independent examination rule" (BIO 17 (citing Pet. App. 39a)) is seriously misleading because it omits the dissent's conclusion that the majority's application of the rule "*is empty*" and "strip[s] the independent examination rule of its intended purpose and meaning" (Pet. App. 39a-40a (emphasis added)).

b. Although Suzuki contends that the Ninth Circuit reviewed the "whole record," the critical point is that (as the petition explained) the court held that it could do no more than "review[] the record to identify evidence *favoring the plaintiff*."

Pet. 17. As Judge Kozinski explained, the court "doubtless perused the record with great care *in search of something to support Suzuki's case*." Pet. App. 72a (emphasis added). The three citations from the opinion offered by Suzuki (see BIO 17-18) actually prove that CU's reading is correct – that is, that the Ninth Circuit held that it could consider only Suzuki's evidence:

First, Suzuki's quotation from Judge Graber omits her conclusion that only the plaintiff's evidence is relevant: "[W]e are required to examine the entire record in determining whether *the nonmoving party* has presented evidence sufficient to allow a reasonable jury to conclude, by clear and convincing evidence, that a public figure has proven actual malice." Pet. App. 30a (emphasis is on language omitted by Suzuki).

Second, contrary to Suzuki's claim that "both Judge Tashima and Judge Graber repeatedly referred to 'the record,' without any suggestion that CU's evidence was being excluded" (BIO 18), the court of appeals in fact specified that only the non-moving party's evidence is relevant on summary judgment. Contrary to Suzuki's misleading suggestion that the district court found "cartloads" of evidence supporting its claim of actual malice (BIO 13 (quoting Pet. App. 83a)), the court actually found "cartloads" of evidence that produced more than 400 findings of undisputed fact supporting *CU*. The court of appeals nonetheless considered only "*the evidentiary basis for Suzuki's claims*," holding that "*[t]his evidence* is adequate to preclude summary judgment" and that a "permissible inference of reckless disregard follows from *this evidence* of 'rigged' testing." Pet. App. 20a-21a (emphases added). The majority then acknowledged that "CU has offered evidence of its accuracy in its reporting" but refused to consider that evidence because, in its view, the legal question was merely "whether there is adequate evidence to support the contrary view – namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, *that is not a question to be resolved here*." *Id.* 19a-20a (emphasis added).

Third, Suzuki's claim that the majority's opinion "repeatedly cited and analyzed evidence that CU had presented in its defense" (BIO 18) rests on a single citation to Pet. App. 28a, where the majority noted that "CU's discussion of the rollover statistics or its criticisms of Suzuki's own accident avoidance tests * * * does not demonstrate CU's purposeful avoidance of critical facts." But that statement addresses only whether there was evidence that CU had engaged in the purposeful avoidance of the truth by not responding to NHTSA's criticism. See Pet. App. 23a-29a ("Purposeful Avoidance" (title)). As to the larger question of whether there was sufficient evidence that CU exhibited reckless disregard for the truth, the court held that only Suzuki's evidence was relevant. See *supra* at 6.

3. The circuit conflict created by the Ninth Circuit's ruling arises from an ambiguity in this Court's precedents that only this Court can resolve. *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), held that the *New York Times* "clear and convincing evidence" standard applies at the summary judgment stage. *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991), "reiterated and applied the standards from *Anderson*." BIO 16. Although neither case addressed the independent examination rule, *Anderson* "sends conflicting signals to trial courts" regarding how to evaluate summary judgment motions on the question of actual malice. 477 U.S. at 265 (Brennan, J., dissenting). See also *id.* at 269 (Rehnquist, J.). On the one hand, *Anderson* states that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249. The Ninth Circuit thus reads *Anderson* to preclude "weighing" the evidence even to the extent of assessing the strength of both the plaintiff's and the publisher's evidence, albeit construed in the light most favorable to the plaintiff, in order to determine whether a jury could find, based on the entire record, that there is "clear and convincing" evidence of actual malice. See Pet. App. 14a-15a.

On the other hand, *Anderson* requires the court to determine, on the basis of the "quantum and quality of proof" as well as the "character" and "caliber" of all the evidence, whether the record

is "so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52, 254; see Pet. 19-22 (collecting cases from the Second, Eighth, Ninth, and D.C. Circuits as well as state courts). Other circuits, unlike the Ninth Circuit, accordingly construe contested evidence in the plaintiff's favor without finally "determining the truth" of any contested fact, but apply the independent examination rule to determine from the whole record whether a plaintiff could prevail at trial in a judgment that the court would not overturn as contrary to the First Amendment. See Pet. 19-21. As Judge Kozinski explained, and other circuits hold, courts must "resolv[e] the predicate factual disputes in the plaintiff's favor," but then "take the further step of independently 'determin[ing] whether the record establishes actual malice with convincing clarity.'" Pet. App. 51a-52a (quoting *Bose*, 466 U.S. at 514). This case presents the opportunity to resolve the ambiguity in *Anderson* and the resulting circuit conflict. See generally *Summary Misjudgment: The U.S. Supreme Court Faces Its Most Important Libel Law Ruling In Decades, If The Justices Will Only Take The Case*, Editor & Publisher, Sept. 29, 2003, at 9.

II. Certiorari Is Warranted To Review The Ninth Circuit's Holding That Publishers May Be Held Liable Based On Their Disagreement With The Government Or Their Financial Condition.

This case also involves the court's obligation to make an independent judicial determination whether the plaintiff's claim rests on a theory that is inconsistent with the First Amendment. Here, it does. The Ninth Circuit held that CU could be found liable on the theory that the "technical criticism of a government agency" (BIO i) – which CU had criticized as a "reluctant watchdog" – constitutes "purposeful avoidance of the truth." Suzuki does not dispute that no other state or federal court has *ever* accepted anything remotely like its theory. See Pet. 27-28 (collecting cases). CU disagreed with a regulatory agency on what Suzuki admits is a "scientific[]" and "technical" question (BIO 4, 26) with respect to which the government admitted "there is no standard, accepted test or series of test procedures" (Pet. App. 288a). Indeed, Suzuki now is on the losing side of "a

30-year debate about how the government should deal with rollover dangers, especially among higher-riding [SUVs]." Harry Stoffer, *Driving Tests Expand Rollover Ratings*, Automotive News, Oct. 6, 2003. Further, CU did not "avoid" the issue: the entire thrust of CU's extensive internal analysis (Pet. App. I) and its published response (*id.* G) was that CU's testing methodology *is* valid, and that (as the district court found undisputed) the government "*was misled by Suzuki*" (Pet. App. 181 ¶ 381 (emphasis added)), which was the source of the government's data.

The Ninth Circuit also inexplicably held that CU's alleged financial distress in *1988* could contribute to a jury's finding of "clear and convincing evidence" that CU exhibited reckless disregard for the truth when it spoke in *1996*. Suzuki parrots the Ninth Circuit's reliance on *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 668 (1989), which rejected a publisher's argument that "evidence concerning motive or care never bears any relation to the actual malice inquiry." See BIO 28. But CU's allegedly poor financial *condition* is not the same thing as a *motive* to lie. In *Harte-Hanks*, there was "substantial probative evidence" of financial motive because the defendant sought to publish the story in question in order to "scoop[]" and "undermin[e]" a publisher with which it "was engaged in a bitter rivalry." 491 U.S. at 665 n.6. The Ninth Circuit's holding, in practice, means that there is evidence of actual malice against most publishers, given the general financial plight of the industry, and furthermore that not-for-profit publishers like CU receive less First Amendment protection than more financially successful profit-seeking ventures. See Cons. Fed'n Br. 5.

CONCLUSION

The petition for certiorari should be granted.

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Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORP.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF ABC, INC., THE ASSOCIATED PRESS, BELO CORP., CABLE NEWS NETWORK LP, LLP, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, CBS BROADCASTING INC., THE COPLEY PRESS, INC., DAILY NEWS, L.P., DOW JONES & COMPANY, INC., FREEDOM COMMUNICATIONS, INC., GANNETT CO., INC., THE HEARST CORPORATION, KNIGHT-RIDDER, INC., MAGAZINE PUBLISHERS OF AMERICA, THE McCLATCHY COMPANY, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PUBLIC RADIO, INC., NEWSPAPER ASSOCIATION OF AMERICA, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, TIME INC., AND TRIBUNE COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae include the country's leading news services, the publishers of daily newspapers and weekly news magazines, national broadcast and cable news networks, and national associations of journalists, publishers and broadcasters (the "*Press Amici*").[1] *Press Amici* urge review of this case both because substantial confusion exists among the circuits on the issues concerning summary judgment in libel lawsuits that so deeply divided the Ninth Circuit, and because the unique and restrictive standard adopted below cannot be reconciled with this Court's prior rulings protecting speech about public figures. If left undisturbed, the Ninth Circuit's holding threatens to curtail reporting about product safety, public health, scientific debate and other issues of obvious importance.

Ever since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defined a limited category of false speech that is nonetheless protected by the First Amendment, summary judgment has played a pivotal role in ameliorating the punitive impact of libel lawsuits filed by public figures such as Suzuki Motor Corporation. Summary disposition minimizes the *in terrorem* effect that baseless litigation imposes on a newsroom. *Press Amici* regularly seek summary judgment in libel lawsuits and succeed nearly eighty percent of the time in disposing of them before trial.[2]

The Ninth Circuit's cramped view of a court's role on summary judgment will inevitably weaken its utility. As Judge Kozinski, writing for eleven judges of the Ninth Circuit

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[1] A complete list of the *Press Amici* is set out in the Addendum. Pursuant to S. Ct. R. 37.6, the *Press Amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than the *Press Amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

[2] *See* p. 13 & n.18 *infra*.

who voted (unsuccessfully) for *en banc* review of the panel decision, recognized:

> The practical effect of the panel's decision is that our review for sufficiency at summary judgment is now governed by one standard, while our review after a jury verdict is governed by another. Cases will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*. What possible purpose is served by such mock trials?

Suzuki Motor Corp. v. Consumers Union, 330 F.3d 1110, 1114 (9th Cir. 2003) (Kozinski, J., dissenting).

SUMMARY OF ARGUMENT

1. The decision below deserves review because summary judgment plays a critical role in minimizing the speech-restricting impact of libel litigation, and because substantial confusion exists among the circuits about the independent judicial examination of the evidence of "actual malice" that is required at the summary judgment stage. In *New York Times Co. v. Sullivan*, this Court adopted the "actual malice" standard to define a category of false and defamatory speech that is nonetheless protected by the First Amendment. Simultaneously, the Court in *Sullivan* created two procedural protections for speech about public persons—a requirement that actual malice be proven by "clear and convincing" evidence and a constitutional obligation imposed on judges to examine the record independently and determine whether that heightened burden of proof has been met. Twenty years later, in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Court underscored that the "independent examination rule" requires *judges* to perform a searching review of the record supporting a libel verdict to ensure that liability is not imposed on protected speech. In this case, the Ninth Circuit concluded that no such review may properly be undertaken before a trial has occurred. Citing *dicta* in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (language then-

Justice Rehnquist described in dissent, 477 U.S. at 269, as sounding "much like a treatise about cooking by someone who has never cooked"), the Ninth Circuit held that summary judgment must be denied if the evidence presented by a public figure plaintiff, viewed in isolation, could support a finding of actual malice.

The Ninth Circuit's restrictive view stands in conflict with other courts. Several circuits, including the First, Fifth, Seventh, Tenth and Eleventh, have adopted the position of the dissenting member of the Ninth Circuit panel. In those circuits, a court must determine on summary judgment whether a reasonable jury could find actual malice on the basis of the *entire* record, resolving all factual disputes and drawing all inferences in plaintiff's favor. Other circuits, including the Second, Fourth, Eighth and District of Columbia, have adopted the position urged below by the eleven judges who dissented from denial of *en banc* consideration. In those circuits, the same independent judicial examination of the record is required on summary judgment as on appeal. No other circuit has endorsed the Ninth Circuit's myopic approach.

2. Review should be granted for the further reason that the summary judgment standard adopted by the Ninth Circuit cannot be reconciled with this Court's prior holdings. *Sullivan* and its progeny establish that the existence of "actual malice" sufficient to remove the First Amendment's protection from speech about a public figure is a question of law to be determined independently by a judge. Treating "actual malice" on summary judgment like a simple factual dispute, the Ninth Circuit has misconstrued both the nature of the "independent examination rule" articulated in *Sullivan* and *Bose* and the role of the "actual malice" standard as a tool for defining and limiting the category of unprotected speech.

3. Review should also be granted because the Ninth Circuit's decision threatens to limit the speech of any media organization that disseminates the news nationally by

requiring a full trial even where, as here, the trial judge concludes that the challenged speech is protected by the First Amendment as a matter of law. Such trials not only inhibit speech about public matters, they serve no useful purpose. Indeed, the reported cases reveal that, even now, an estimated two-thirds of libel *verdicts* rendered for those plaintiffs who survive summary judgment are ultimately reversed on appeal for lack of the requisite proof of actual malice.[3] In this case, *every* judge who has looked at the whole record agrees that it does not contain constitutionally sufficient evidence of actual malice. Nevertheless, under the restrictive rule adopted by the Ninth Circuit majority—one that looks only at plaintiff's evidence—a trial is required. Such a rule will inevitably impose enormous costs on both media defendants and the courts, increasing the number of trials and appeals as well as the number of verdicts reversed on appeal. And, if the type of evidence relied on below is deemed sufficient to raise an issue of "actual malice" requiring a full trial, the Ninth Circuit's holding is likely to have a particularly harsh impact on consumer and product safety reporting.

ARGUMENT

I. SUBSTANTIAL CONFLICT EXISTS AMONG THE CIRCUITS ABOUT THE PROPER APPLICATION OF THE "INDEPENDENT EXAMINATION RULE" ON A MOTION FOR SUMMARY JUDGMENT

A. This Court's Prior Decisions Have Caused Confusion About the Proper Application of the "Independent Examination Rule" on Summary Judgment

In *Sullivan*, this Court held that speech about public officials (later extended to public figures) is presumptively protected by the First Amendment and that "neither factual

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[3] *See* p. 14 & n.20 *infra*.

error nor defamatory content suffices to remove the constitutional shield." 376 U.S. at 273. Rather, constitutional protection for speech about public figures is lost only when the plaintiff "proves that the statement was made with 'actual malice.'" *Id.* at 279-80. To ensure that protected speech is not infringed, the Court simultaneously erected two procedural safeguards for speech about public figures: a heightened evidentiary standard requiring actual malice to be established with convincing clarity, and independent judicial review of the evidence of actual malice—a review that must encompass "the statements in issue and the circumstances under which they were made." *Id.* at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946)).

Twenty years later, in *Bose Corp. v. Consumers Union*, the Court reaffirmed that "the rule of independent review assigns to judges a *constitutional* responsibility that cannot be delegated to the trier of fact." 466 U.S. at 501 (emphasis added). The Court stressed the importance of such review "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505. As the Court emphasized in *Bose*, 466 U.S. at 511:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Both *Sullivan* and *Bose* came to this Court following the imposition of defamation liability at a trial—in *Sullivan*, after a jury verdict, and in *Bose*, after a bench trial. As a result, neither decision addressed directly the scope of a court's obligation to undertake an "independent review" of the record evidence of actual malice at the summary judgment stage. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254, 257,

however, the Court held both that a judge ruling on a motion for summary judgment must "view the evidence presented through the prism of the substantive evidentiary burden" and that summary judgment in a public figure libel action "must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists." While the Court had no occasion to address the "independent examination rule" in *Liberty Lobby*, it did direct that:

> a trial judge *must bear in mind* the actual *quantum* and *quality* of proof necessary to support liability under *New York Times*. For example, there is no *genuine* issue if the evidence presented in the opposing affidavits is of insufficient *caliber* or *quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Id. at 254 (emphasis added).

Justices Rehnquist and Brennan, in separate dissents, nevertheless predicted that *Liberty Lobby* would confuse the lower courts and "cause the decisions of trial judges on summary judgment motions in libel cases to be more erratic and inconsistent than before." *Id.* at 272-73 (Rehnquist, J., dissenting). Justice Rehnquist lamented the majority's "great[] mistake" in providing only "abstractions and paraphrases of abstractions" as guidance to the lower courts, *id.* at 269, while Justice Brennan forecast "increased confusion in the district and appellate courts," *id.* at 265 (Brennan, J., dissenting).

This Court has yet to address directly the central issue presented here: whether a court's obligation to undertake an "independent examination" of the record evidence of actual malice in a public figure libel action applies at the summary judgment stage in the same way it applies on appeal.[4] And,

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[4] In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), the Court applied *Liberty Lobby* in a libel case that presented the issue of

as predicted by the dissenters in *Liberty Lobby*, substantial confusion and inconsistent holdings have inevitably emerged throughout the lower courts.

B. Lower Courts Have Reached Conflicting Conclusions About the "Independent Examination Rule" on Summary Judgment

The several opinions issued by Ninth Circuit judges in this case mirror the widespread confusion among courts, state and federal. The Ninth Circuit's holding, reflected in the panel's majority and concurring opinions, authorizes a court to examine *only* the evidence of actual malice proffered by the *plaintiff* in opposing summary judgment. If that evidence, standing alone, would permit a reasonable jury to find actual malice, summary judgment must be denied without regard to contrary evidence presented by a defendant, even if that evidence is undisputed. *Suzuki*, 330 F.3d at 1135. The majority below thus acknowledged the substantial, uncontradicted evidence supporting Consumers Union ("CU"), but rejected this evidence as largely irrelevant:

> [CU's] characterization of its own evidence as overwhelming and its disparagement of Suzuki's evidence as out of context begs the question that we must resolve. . . . [T]he issue is whether there is *adequate evidence to support the contrary view*—namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. *While it may be true that CU's evidence of meticulous reporting ultimately has more weight* than

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whether an author's alteration of quotes amounted to actual malice. The Court confirmed that the existence of actual malice is a "constitutional question," even "in the framework of a summary judgment motion." *Id.* at 513. Nevertheless, because the *only* undisputed evidence favored the plaintiff, *id.* at 269, the Court was not called upon to explain how the independent examination rule applies in determining whether a summary judgment record reflects a *genuine* dispute about the presence of actual malice.

> Suzuki's evidence of actual malice, *that is not a question to be resolved here.*[5]

Among the federal courts, only the Ninth Circuit has adopted this restrictive rule.[6] Judge Ferguson, the panel dissenter, objected that the majority "fail[s] to grasp how the *additional* procedural protection of the independent examination functions." *Id.* at 1142 (Ferguson, J., dissenting) (emphasis in original). He concluded that the "independent examination" rule requires a court to review the summary judgment record *as a whole* and consider "not just that which favors the plaintiff," but also the undisputed evidence proffered by the defendant. *Id.* at 1145. Looking at *all* the evidence from the perspective of a reasonable jury, and drawing all inferences in plaintiff's favor, Judge Ferguson would have affirmed the trial court's entry of summary judgment. *See id.* at 1143. Judge Ferguson's application of the "independent examination" rule has been embraced by the First, Fifth, Seventh, Tenth and Eleventh Circuits, as well as by several state courts.[7]

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[5] *Suzuki*, 330 F.3d at 1134-35 (citations omitted) (emphasis added). Judge Graber concurred in this holding, emphasizing that the independent examination rule must be applied differently on summary judgment than after trial. *Id.* at 1141 (Graber, J., concurring).

[6] *See also Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (court reviewed only evidence produced by plaintiff and denied summary judgment because "a reasonable juror could find actual malice").

[7] *See, e.g., Catrone v. Thoroughbred Racing Ass'ns*, 929 F.2d 881 (1st Cir. 1991); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *Harris v. Quadracci*, 48 F.3d 247 (7th Cir. 1995); *Revell v. Hoffman*, 309 F.3d 1228, 1233-34 (10th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3751 (Mar. 30, 2003) (No. 02-1718); *Hammer v. Slater*, 20 F.3d 1137 (11th Cir. 1994); *Perez v. Scripps-Howard Broad. Co.*, 520 N.E.2d 198 (Ohio 1988); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472 (Wis. 1997).

Judge Kozinski, and ten other judges dissenting from the denial of rehearing *en banc*, applied the "independent examination" rule in a third way. Observing that "it hardly 'preserve[s] the precious liberties established and ordained by the Constitution' to treat a First Amendment case the same as a slip-and-fall," these judges would require on summary judgment the same "independent examination" by a judge as must occur after a trial.[8] To be sure, these judges recognized that all disputes of historical fact and all "questions about a witness's credibility" must be resolved at summary judgment in favor of the nonmoving party. Within these constraints, however, they concluded that a judge:

> must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." And *that* process . . . *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.[9]

The Second, Fourth, Eighth and District of Columbia Circuits, as well as a host of state courts, all have applied the "independent examination rule" in this manner.[10]

As these conflicting approaches attest, confusion has carried the day in the wake of *Liberty Lobby*. Such "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the

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[8] *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting) (quoting *Bose*, 466 U.S. at 510-11).

[9] 330 F.3d at 1113-14 (quoting, *inter alia*, *Bose*, 466 U.S. at 514).

[10] *See, e.g.*, *Contemporary Mission Inc. v. New York Times Co.*, 842 F.2d 612, 622 (2d Cir. 1988); *Carr v. Forbes*, 259 F.3d 273 (4th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002); *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir. 1989); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988); *Southall v. Little Rock Newspapers*, 964 S.W.2d 187 (Ark. 1998); *Wiemer v. Rankin*, 790 P.2d 347 (Idaho 1990); *Welch v. Am. Publ'g Co.*, 3 S.W.3d 724 (Ky. 1999); *Herbert v. Okla. Christian Coalition*, 992 P.2d 322 (Okla. 2000); *George v. Fabri*, 548 S.E.2d 868 (S.C. 2001).

standard, the less protection it affords."[11] Pleading for review of the decision below by this Court, Judge Kozinski concluded:

> Allowing a plaintiff to get to trial on a record that will not support a verdict under *New York Times* does not make sense, and if some of the Court's precedents can be read to suggest this result, the Court would do us all a great favor by explaining that it intended no such absurdity.[12]

II. THE NINTH CIRCUIT'S STANDARD UNDERMINES THIS COURT'S HOLDINGS CONCERNING THE CONSTITUTIONAL PROTECTION AFFORDED SPEECH ABOUT PUBLIC FIGURES

The decision below warrants review for the further reason that it cannot be squared with this Court's decisions defining the type of speech about public figures that is protected by the First Amendment and the role of judges in enforcing that constitutional protection. By requiring a full-blown trial in this case, the Ninth Circuit misconstrued both the role of a judge in minimizing the speech-silencing impact of litigation brought by public figures and the nature of the "clear and convincing" evidence of "actual malice" required to remove the First Amendment's protection from speech about public figures.

Sullivan and *Bose* emphasize that courts must, as a matter of law, define the boundary between protected and unprotected speech about public figures.[13] This constitutional

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[11] *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

[12] *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting).

[13] *E.g.*, *Bose*, 466 U.S. at 501. Even though a finding of actual malice is dependent on the facts of a particular case, the Court explained in *Bose*, "the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." *Id.* at

obligation is satisfied when an independent examination of the record is undertaken to ensure that it contains clear and convincing evidence of actual malice.[14] Underscoring these important constitutional principles, the Court in *Liberty Lobby* held that the heightened "clear and convincing" evidence standard imposed on proof of actual malice must be applied at the summary judgment stage as well as following a trial.[15] And, in *Harte-Hanks Communications, Inc. v. Connaughton*, the Court re-emphasized the role of a judge in assessing the evidence of actual malice:

> The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice *is a question of law*. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard.[16]

It is impossible to square the decision below with these prior holdings. Finding it "plausible" that CU "'rigged' a test to achieve a predetermined result in order to serve its own pecuniary interests," the Ninth Circuit treated the actual malice issue like any other factual dispute and concluded that a jury must decide whether to draw this conclusion. *Suzuki*, 330 F.3d at 1133. Under this Court's precedents, however, the issue for a judge on summary judgment is not whether the jury must "weigh the evidence" with respect to "particular factual predicates of actual malice," *id.* at 1113, but whether, after resolving all conflicts and drawing all reasonable inferences in plaintiff's favor, these "historical facts" provide

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501 n.17. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 220 (actual malice is a "constitutional fact" that an appellate court must review *de novo*).

[14] *Bose*, 466 U.S. at 508.

[15] *Liberty Lobby*, 477 U.S. at 252.

[16] 491 U.S. at 685-86 (emphasis added).

sufficient evidence of actual malice to remove the First Amendment's protection from the speech at issue. In other words, after resolving any predicate factual disputes in plaintiff's favor, "the judge must take the further step of independently 'determin[ing] whether the record establishes actual malice with convincing clarity.'"[17] To hold otherwise erodes the constitutional protection mandated in *Sullivan* and disavows the constitutional "imperative that *judges*—and in some cases judges of this Court—make sure that [the actual malice standard] is correctly applied." *Bose*, 466 U.S. at 502 (emphasis added).

III. THE NINTH CIRCUIT'S STANDARD THREATENS THE ROBUST AND WIDE-OPEN EXCHANGE INTENDED BY THE FIRST AMENDMENT

The Ninth Circuit's holding warrants review by this Court for the further reason that it will surely have an impact far beyond the parties to this case. Unlike some situations in which a problematic circuit decision has limited geographic reach, the summary judgment standard adopted in the Ninth Circuit threatens to affect the speech of any news organization with a nationwide audience, limiting particularly national reporting about health and safety issues. If Suzuki Motor Corporation is entitled to a jury's evaluation of the *bona fides* of CU's view that the Samurai "easily" rolls over and is "Not Acceptable," despite CU's full and complete disclosure of the bases for its conclusion, then virtually any product evaluation is at risk and this valuable journalistic genre is seriously compromised.

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[17] *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting) (quoting, *inter alia*, *Bose*, 466 U.S. at 514).

A. The Standard Adopted By the Majority Below Will All But Eliminate the Availability of Summary Judgment on "Actual Malice"

As Justice O'Connor noted in *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion), it is "important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." This is nowhere more true than with respect to the procedures mandated by the First Amendment to govern summary judgment in public figure libel cases. Since *Sullivan*, summary judgment has been a significant tool for minimizing the speech-restricting impact of costly libel litigation pursued by well-financed public figures. Reported cases indicate that media libel defendants succeed in obtaining summary judgment nearly eighty percent of the time that it is sought.[18]

The constitutional protection intended by the actual malice standard has, however, contributed surprisingly little to this success rate. Lack of actual malice was a successful ground of decision in only thirty-two percent of reported decisions in which media defendants sought summary judgment.[19] By the

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[18] *See 2001 Summary Judgment Study*, Libel Defense Resource Center, Bulletin No. 3 (Aug. 2001) at 1, 12, Table 5 (reporting data from 1980-2000) ("LDRC Bulletin"). *See also* Katie Eccles, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 Stan. L. Rev. 1577, 1579 n.4 (1990) ("Eccles") ("[s]eventy-five percent of the motions for summary judgment are granted in favor of the libel defendant"). Moreover, of those reported cases from 1980-2000 in which media defendants took interlocutory appeals of denials of summary judgment, courts reversed the denials 69% of the time. *See* LDRC Bulletin at 20-21, Table 9A (figure includes cases dismissed and remanded).

[19] *See* LDRC Bulletin at 1, 29, Table 11. The LDRC Bulletin reports that there were 1380 reported decisions ruling on defense motions for summary judgment from 1980-2000. *Id.* at 2. Defendants prevailed on the issue of actual malice in 447, or 32%, of those cases. *See id.* at 27-29 & nn. 41, 42, Table 11.

same token, an estimated two-thirds of libel *verdicts* rendered for those plaintiffs who survive summary judgment are ultimately reversed on appeal for lack of the requisite proof of actual malice.[20] This means that many public figure libel cases proceed through expensive trials only to have a resulting jury verdict thrown out after the mandated "independent review" determines the speech at issue is constitutionally protected after all.

This recurring scenario is exemplified by the recent case of *Cobb v. Time, Inc.*, 278 F.3d 629 (6th Cir.), *cert. denied*, 537 U.S. 878 (2002), a libel lawsuit brought by a public figure against *Sports Illustrated* ("*SI*") for its report that he had participated in a fixed boxing match and then used cocaine with his opponent. *SI* based its report on substantial research and investigation, including interviews with Cobb's opponent; the executive director of the state athletic commission; Cobb's promoter; the promoter's business partner; another boxer originally scheduled to fight Cobb that night; and, briefly, Cobb himself. *Id.* at 633-36. *SI* also had reviewed a videotape of the fight and consulted its own in-house boxing experts. *Id.* at 640.

Cobb filed his libel suit in September 1994. The following year, *SI* moved for summary judgment on the ground that the statements at issue were not published with actual malice. The district court denied the motion, in part, because it understood that its role on summary judgment was limited to reviewing plaintiff's evidence of actual malice, and not to

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[20] Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 Temple L. Rev. 231, 232 n.1 (2002); *see also* Eccles, *supra*, at 1579 n.4 ("[t]he reversal rate on appeal is 60 to 70% of adverse [libel] judgments"); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio State L. J. 1753, 1781 (1998) (concluding that a "high proportion" of libel defendants who proceed to trial should have been granted summary judgment).

evaluating that evidence in the context of the whole record.[21] Four years later, a jury returned a $10.7 million verdict for Cobb. Following post-trial motions and an appeal, in January 2002, nearly seven years after the district court denied summary judgment, the Sixth Circuit vacated the jury verdict and entered judgment for *SI* because its "independent review" of the *entire record* found the evidence of actual malice "far short of the clear and convincing standard." *Id.* at 638.

This is not an isolated example. In *Newton v. National Broadcasting Co.*, 930 F.2d 662, 671 (9th Cir. 1990), a 37-day jury trial followed the district court's denial of summary judgment on actual malice[22] and produced a jury verdict of more than $19 million. Again, the verdict was reversed on appeal because an independent examination of the *entire* record, not conducted on summary judgment, "reveal[ed] almost no evidence of actual malice, much less clear and convincing proof." *Id.* at 687. Such reversals on evidence largely undisputed at the summary judgment stage occur all too often.[23]

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[21] *See Cobb v. Time, Inc.*, No. 3:94-0836, 1995 WL 861518 (M.D. Tenn. Aug. 30, 1995) (modifying original order).

[22] *See Newton v. NBC*, 13 Media L. Rep. 1224 (D. Nev. 1986) (denying summary judgment).

[23] *E.g., Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992) (reversing jury verdict in favor of public official because "independent examination" revealed insufficient evidence of actual malice); *compare Mercer v. Cedar Rapids*, 104 F. Supp. 2d 1130 (N.D. Iowa 2000) (allowing question of actual malice to go to jury) *with Mercer v. Cedar Rapids*, 308 F.3d 840 (8th Cir. 2002) (reversing jury verdict for plaintiff because district court committed "error of law" in treating "actual malice as a question of fact for the jury"); *Veilleux v. NBC*, 8 F. Supp. 2d 23 (D. Me. 1998) (denying summary judgment) *with Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000) (reversing jury verdict after independent review of record established that plaintiff's evidence did not satisfy even negligence standard); *Bose Corp. v. Consumers Union*, 84 F.R.D. 682 (D. Mass. 1980) (denying summary judgment on actual malice) *with Bose Corp. v. Consumers Union*, 692 F.2d 189 (1st Cir. 1982) (reversing trial court's

The holding below will only increase the number of unnecessary and counterproductive trials in public figure libel cases. If the standard adopted by the Ninth Circuit is permitted to govern summary judgment in public figure cases, the cost for news organizations to defend themselves in resulting "mock trials" will be enormous. Indeed, it has been estimated that the cost of litigating a libel case through trial is *four times greater* than the cost to litigate it through summary judgment.[24]

Unnecessary libel trials exact an even greater societal cost because "slow and expensive determination[s]" of libel actions "result in self censorship." *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting). As one commentator has recognized:

> It is no answer . . . that a plaintiff without proof will probably suffer a directed verdict or its equivalent at trial . . . . Plaintiff can still subject the defendant to the high cost and uncertainty of preparing and trying these complex cases and often may be able to force from the defendant an artificially high settlement. Even worse, media defendants subject to such high settlements may lose their zeal for publishing controversial stories.[25]

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verdict after trial, finding insufficient evidence of actual malice), *aff'd*, 466 U.S. 485 (1984).

[24] *See* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 14 n.81 (1983).

[25] *See* Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 717 (1984). *See also, e.g.*, *Sassone v. Elder*, 626 So. 2d 345, 347 (La. 1993) ("[The] failure to dismiss an unwarranted defamation action by summary judgment produces long and expensive litigation which has a chilling effect upon free speech."); *Chafin v. Gibson*, 578 S.E.2d 361, 368 (W. Va. 2003) ("'Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement . . . .'") (citation omitted); David

There is simply "no sensible reason to impose such onerous costs on a publisher where the plaintiff is doomed to fail." *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting). As Judge Kozinski observed below, "I know of no other context where we allow a plaintiff to get to trial with a factual record that will not support a verdict in his favor." *Id.* at 1114.

B. The Evidence Deemed Sufficient Below to Create a "Genuine" Dispute About Actual Malice Would Require a Jury Trial Virtually Every Time Product Safety Reporting is Challenged

The holding below also promises a dramatic impact on speech by virtue of its expansive view of the types of evidence with which a public figure can overcome a motion for summary judgment. Specifically, the Ninth Circuit relied largely on two hypotheses advanced by plaintiff as "evidence" of actual malice: a dubious inference of CU's financial motive to falsify its findings, and its disagreement with a government agency about safety testing standards. *See id.* at 1135-36. These "facts," even taken together, cannot properly provide the "quality" and "quantum" of evidence of actual malice demanded under *Liberty Lobby*.

While financial motive can be relevant to the issue of actual malice, the Ninth Circuit has placed undue reliance on a factor that can be alleged—one way or another—in virtually

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A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 513 (1991) ("Allowing judges to make these determinations early in the litigation avoids the expense and delay of unnecessary jury trials. These benefits are lost when judges make their decisive judgments only *after* a jury has made its own determination of the matter.") (emphasis added); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 279-80 (1987) (arguing that a rule requiring courts to weigh evidence on summary judgment "would reduce the total procedural costs for the parties and the court by eliminating needless trials and complicated appeals").

any public figure libel case.[26] Nearly *every* publisher, to some degree, "must have economic goals in mind," but other courts repeatedly have refused "to hold that such considerations would indicate actual malice."[27] Indeed, "[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels." *Connaughton*, 491 U.S. at 667.

The Ninth Circuit similarly erred in equating a disagreement with the government over testing methods with evidence of CU's knowledge of falsity—a conclusion that seriously misapprehends the role of the press in criticizing, questioning, and interpreting government action.[28] It cannot be that a publisher's disagreement with the findings of a government agency constitutes evidence of actual malice requiring a trial, particularly in the arena of scientific debate:

> Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—

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[26] *See Suzuki*, 330 F.3d at 1136; *Kaelin*, 162 F.3d at 1042 (denying summary judgment on actual malice because, *inter alia*, "a reasonable juror [could] draw the inference that [defendant] had a pecuniary motive").

[27] *Foretich v. ABC*, Nos. Civ. A 93-2620, Civ. A 94-0037 (HHG), 1997 WL 669644, at *8 (D.D.C. Oct. 17, 1997); *accord, e.g.*, 1 Robert D. Sack, *Sack on Defamation, Libel, Slander & Related Problems* § 5.5.2, at 5-88 (3d ed. 2000) ("That the defendant publishes for profit, or even in a specific instance to increase profits, is not evidence of 'actual malice.'"); *Peter Scalamandre & Sons v. Kaufman*, 113 F.3d 556, 561 (5th Cir. 1997) (same); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991) (same).

[28] *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("a function of free speech under our system of government is to *invite dispute*") (emphasis added).

> mark the path toward superior understanding of the world around us.[29]

Consumer reporting has historically played an invaluable role in promoting public safety and health. Upton Sinclair's *The Jungle* (1906) exposed the significant risks posed to the food supply by the meat packing industry. Rachel Carson's *Silent Spring* (1962) identified potential hazards posed by the use of chemical pesticides like DDT. Ralph Nader's *Unsafe at Any Speed* (1965) ignited national discussion about auto-safety. Eric Schlosser's *Fast Food Nation* (2002) uncovered unseemly food preparation and labor practices in the fast food industry. All of these important works challenged the conventional, governmentally endorsed wisdom and all would therefore be subject to litigation before a jury under the standard adopted below, as would groundbreaking reporting on the health dangers of smoking and a host of analogous reports about consumer products and business practices.[30]

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[29] *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (Easterbrook, J.). *See, e.g., Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987) (no actual malice where newspaper published story despite knowledge that its position differed from that of police department); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (defendant under no duty to retract allegations discredited by congressional task force).

[30] The evidence about smoking's hazards was long reported in the media while it was being aggressively disputed by the tobacco industry and by the government. *See, e.g., Smoking Found Tied to Cancer of Lungs*, N.Y. Times, May 27, 1950, at 34 (noting "a significant relationship between prolonged tobacco smoking and the development of cancer of the lung"). *See also* Jennifer Peck, *The Crib-Sheet Catastrophe*, Good Housekeeping, Nov. 1998, at 91 (babies can be strangled to death by ill-fitting crib sheets); Adam Rogers, *Weighty Problems*, Newsweek, July 21, 1997, at 65 (fen-phen linked to heart disorders); Gina Kolata, *Animal Fat Is Tied to Colon Cancer*, N.Y. Times, Dec. 13, 1990, at A1 (red meat linked to colon cancer); Ricardo Alonso-Zaldivar, *Car Booster Seats Defective, Parents Allege in Recall Bid*, L.A. Times, Sept. 24, 2002,

Such reports are particularly valuable to the public because they provide important information that has a direct impact on people's lives, and because most citizens do not otherwise have access to it.[31] As a result, courts historically have given wide berth to the necessarily subjective evaluations and characterizations made in such reports.[32] If the Ninth Circuit is correct, however, "[i]t will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury." *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting).

CONCLUSION

For all the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

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at A14 (booster seats meeting federal safety standards eject babies during rollovers and cause neck and head injuries).

[31] *See, e.g., United Med. Labs. v. CBS*, 404 F.2d 706 (9th Cir. 1968) (First Amendment protections especially important when issues of public health and safety are at stake); *In re R.M.J.*, 455 U.S. 191, 200 (1982) (the public often "'lacks sophistication'" or access to information necessary to evaluate a manufacturer's claim) (citation omitted); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996) ("the consumer is not expected to have the competence or access to information needed to question the advertiser's claim").

[32] *See, e.g., Flotech, Inc. v. E.I. DuPont De Nemours & Co.*, 814 F.2d 775 (1st Cir. 1987); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2d Cir. 1980); *United Med. Labs. v. CBS*, 404 F.2d 706 (9th Cir. 1968); *Aequitron Med. Inc. v. CBS*, 964 F. Supp. 704 (S.D.N.Y. 1997); *Quantum Elecs. Corp. v. Consumers Union*, 881 F. Supp. 753 (D.R.I. 1995); *Container Mfg. Inc. v. CIBA-GEIGY Corp.*, 870 F. Supp. 1225 (D.N.J. 1994); *Brueggemeyer v. ABC*, 684 F. Supp. 452 (N.D. Tex. 1988); *Nat'l Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 386 (S.D.N.Y. 1980); *F&J Enters., Inc. v. CBS*, 373 F. Supp. 292 (N.D. Ohio 1974); *Lewis v. Reader's Digest Ass'n*, 366 F. Supp. 154 (D. Mont. 1973); *Safe Site, Inc. v. NRA*, 253 F. Supp. 418, 419 (D.D.C. 1966).

Respectfully submitted,

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APPENDIX A

Descriptions of *Amici*

ABC, Inc., alone and through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20* and *Nightline*.

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

Belo Corp. is a media company with a diversified, market-leading group of television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.7% of U.S. television households, and publishes four daily newspapers with a combined daily circulation of approximately 900,000 and a combined Sunday circulation of more than 1.2 million in the United States. In addition, Belo owns or operates six cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes thirty-four Internet websites, several interactive alliances and a broad range of Internet-based products.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one of the world's most respected and trusted sources for news and information. Its reach extends to fifteen cable and satellite television networks; twelve Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined

branded networks and services are available to more than one billion people in more than 212 countries and territories.

The *California Newspaper Publishers Association* is a trade association representing about 500 daily and weekly newspapers. The CNPA, for well over a century, has stood in defense of the rights guaranteed by the First Amendment.

CBS Broadcasting Inc., a wholly owned subsidiary of Viacom Inc., produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes*, *60 Minutes II*, and *48 Hours Investigates*. CBS owns and operates broadcast television stations nationwide and, through another Viacom subsidiary, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area. The *Daily News* provides daily coverage of news events throughout the United States and the world. Its stories are also available on the Internet through its website, www.nydailynews.com.

Dow Jones & Company, Inc. is the publisher of, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 650,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; and, through its Ottaway Newspapers, Inc. subsidiary, more than twenty daily and weekly newspapers.

Freedom Communications, Inc., headquartered in Irvine, California, is a diversified, family-owned media company of newspapers, television broadcast stations and Internet-based businesses. Freedom's flagship newspaper is *The Orange County Register*, published in Santa Ana, California with a daily circulation of more than 300,000.

Gannett Co., Inc. is an international news and information company that publishes 100 daily newspapers in the United States with a combined daily paid circulation of 7.7 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than one hundred web sites and a national news service. Gannett's twenty-two television stations cover 17.7 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Among them is *Good Housekeeping* magazine, which, through the Good Housekeeping Institute, carefully considers what products it will accept for advertising and to which it will award the "Good Housekeeping Seal." Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Knight-Ridder, Inc. is the second largest newspaper publisher in the United States, publishing 31 dailies in 28 markets, with 8.3 million readers daily and 12.1 million on Sunday. It also publishes 22 nondaily newspapers, as well as shoppers and special publications. In addition, Knight Ridder operates the Real Cities network of 83 regional Web sites.

Magazine Publishers of America ("MPA") is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1.4 million daily and 1.9 million on Sunday.

National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television broadcast stations. NAB's members cover, produce and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

National Broadcasting Company, Inc. produces and distributes news, entertainment and sports programming via the NBC Television Network, NBC News, NBC's owned and operated television stations nationwide, MSNBC, CNBC, Bravo and Telemundo. NBC gathers and reports local and national news daily through broadcast and cable television and the Internet.

National Public Radio, Inc. (NPR) is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition*, *All Things Considered*, and *Talk of the Nation*. It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. Military installations via the American Forces Network.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes eighteen other newspapers, including *The Press Democrat*, Santa Rosa, California's oldest newspaper, and *The Boston Globe*, and owns and operates eight television stations and one radio station.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of

information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*. Time Inc. is indirectly wholly-owned by AOL Time Warner Inc.

Tribune Company, through its publishing, broadcasting and interactive operations, publishes eleven market-leading newspapers including the *Los Angeles Times*, *Chicago Tribune*, *Baltimore Sun*, *Newsday*, *Orlando Sentinel*, and *Hartford Courant*; owns and operates twenty-four major market television stations including KCPQ and KTWB (Seattle), KXTL (Sacramento), KTLA (Los Angeles), and KSWB (San Diego); and operates a network of local and national news and information websites throughout the United States.

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In The
Supreme Court of the United States

Consumers Union of United States, Inc.
Petitioner,

v.

Suzuki Motor Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE FOR HIGHWAY SAFETY

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In The
Supreme Court of the United States

No. 03-281

Consumers Union of United States, Inc.
Petitioner,

v.

Suzuki Motor Corporation and American Suzuki Motor Corporation,
Respondents.

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE FOR HIGHWAY SAFETY

In Support of Petitioner

INTEREST OF *AMICUS CURIAE*

The Insurance Institute for Highway Safety (the Institute) is a nonprofit research and communications organization that identifies and develops ways of reducing motor vehicle-related deaths, injuries, and property damage. The Institute submits this brief *amicus curiae* in support of Consumers Union's Petition for a Writ of Certiorari.[1]

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[1] The Insurance Institute for Highway Safety accepted no monetary contribution for the preparation or submission of this brief, which was written in its entirety by house counsel.

The Institute is supported by the nation's principal automobile insurance companies. The research program of the Institute covers all facets of the highway loss problem, including human, vehicle, and environmental factors. Institute research findings and publications are cited by academic, government, business, and private sector organizations concerned with transportation safety both in the United States and abroad.

The Institute has been a principal source of independent testing and rating information for consumers on the relative safety of vehicles. The Ninth Circuit's decision poses a significant risk to the Institute and other independent organizations by subjecting them to financially devastating lawsuits filed by manufacturers that do not like the results of tests of their products. Accordingly, the Institute supports Consumers Union's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Public ratings of consumer products by independent organizations provide an important public benefit by giving consumers comparative information about the relative safety and other differences among products to allow them to make more informed purchasing decisions. In addition, these programs benefit the public by encouraging manufacturers to improve their products in order to get better ratings. The independent testing and rating of the safety of passenger vehicles arguably are the most important of these consumer information programs. Vehicle testing programs in the United States, Europe, Australia, Japan, and Sweden have directly produced important safety improvements in vehicle crashworthiness, handling, and stability. These programs also have encouraged development of new technologies to promote belt use and decrease pedestrian injuries

and have identified safety-related defects in motor vehicles. Some of these testing programs are conducted by national or local governments, but others are conducted by nongovernment groups such as Consumers Union and the Insurance Institute for Highway Safety (the Institute). These nongovernmental groups will be unable to continue testing if deep-pocketed vehicle manufacturers are able to frivolously use expensive and prolonged lawsuits to suppress the results of these ratings programs. If a rating organization can show by competent evidence that its test procedures and results are objective, it should be allowed to continue conducting its programs and widely publicizing the results without fear of facing lengthy and financially devastating trials in meritless suits filed by manufacturers that do not like the results for their products.

ARGUMENT

I. CRASHWORTHINESS RATING PROGRAMS CREATE INFORMATION ON THE RELATIVE PERFORMANCE OF VEHICLES TO ENCOURAGE MANUFACTURERS TO DESIGN SAFER VEHICLES.

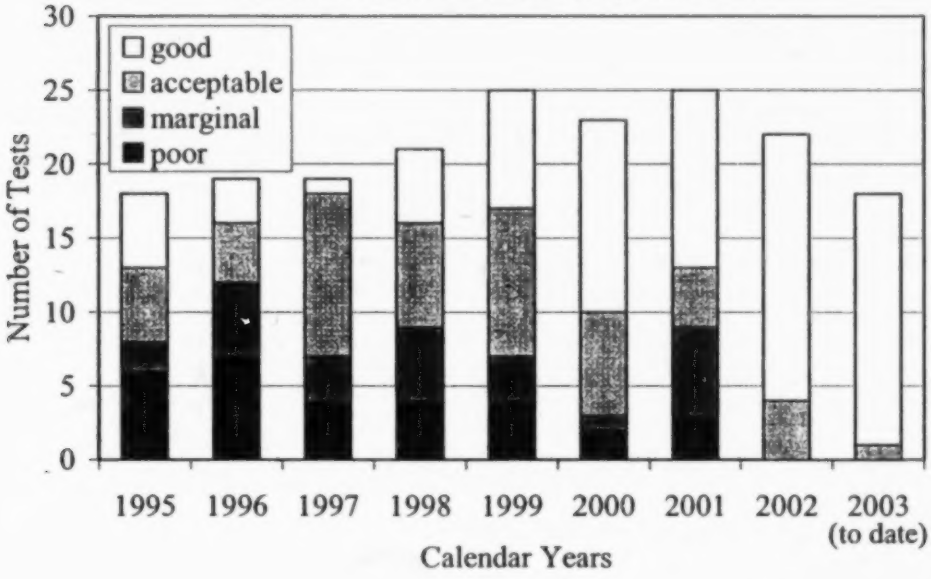
A. Vehicle manufacturers have responded to independent crashworthiness evaluations both in the United States and abroad by improving their vehicles.

Since 1995 the Institute has been rating and comparing vehicle performance in 40 mph frontal offset tests. In the test, which simulates a frontal impact in which the driver side of one vehicle strikes the driver side of a vehicle with the same mass, the Institute evaluates the structural performance of the vehicles (how well the safety cage around the driver remains intact during the impact); the potential

for serious head, neck, chest, and lower limb injuries in the crash; and driver kinematics (how well the airbag and lap/shoulder belt work together to control movement of the test dummy during the impact). Each vehicle is assigned a rating of good, acceptable, marginal, or poor. These ratings are widely distributed by the Institute to consumers, the media, and other organizations.

As shown in the following figure, when the Institute first began rating vehicles in 1995, few were rated good and many were rated poor. As a result of the ratings program, vehicle manufacturers have improved their vehicles' structural and restraint system performances to reduce the possibility of driver injuries. Thus by the 2002 model year, all of the vehicles tested were either good or acceptable. That same trend applies for the 2003 models the Institute has tested. This means newer model passenger vehicles will more effectively protect their occupants against serious injuries in high-severity frontal crashes than vehicles of a few years ago.

Crashworthiness Evaluations, 1995-2003



The success of the Institute's ratings program in improving vehicle safety is similar to what has been achieved by vehicle crashworthiness ratings programs in Europe, Australia, and Japan. In Europe a coalition of private organizations, such as automobile clubs, and national safety agencies, such as the U.K. Department of Transport, has been conducting 40 mph frontal offset and other tests to rate vehicles as a part of the European New Car Assessment Program (EuroNCAP). In addition, the German automobile magazine *Auto Motor and Sport* conducts and publicizes its own 40 mph frontal offset test to rate vehicles. Like Consumers Union and the Institute, *Auto Motor and Sport* receives no government funding for its tests. In Australia a coalition of private organizations, including automobile clubs and insurers, and the Australian federal government and some state governments have been conducting 40 mph frontal offset and other tests as a part of the Australian New Car Assessment Program. In Japan the National Organization for Automotive Safety & Victim's Aid and the Ministry of Land, Infrastructure, and Transport have been conducting 40 mph frontal offset tests to rate vehicles as a part of the Japan New Car Assessment Program. These programs have brought about similar improvements in vehicle frontal crashworthiness performance.[2] For example in 1997, when EuroNCAP first began its frontal offset ratings program, only one model received a four-star rating, the highest rating in the EuroNCAP program. By 2002 four-star performance had become the norm as manufacturers improved their designs.[3]

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[2] Crashtest.com, *Introduction to Auto Safety & Crash-Testing, at* http://www.crashtest.com/intro/intro.htm.

[3] *EuroNCAP Results Spur Improvements in Crashworthiness*, Status Rep., (Ins. Inst., Arlington Va.), Feb. 9, 2002, at 4.

B. Vehicles that perform well in crashworthiness evaluations protect vehicle occupants in real-world crashes.

Research shows that vehicles that are good performers in independent vehicle ratings programs also protect people in real crashes. Researchers at the Swedish National Road Administration and Australia's Monash University found that drivers of vehicles that earn ratings of four stars in EuroNCAP crash tests are about 30 percent less likely to be severely injured in crashes than drivers of cars with one-star ratings.[4]

C. Vehicle ratings programs encourage additional safety improvements.

Improved Handling and Stability. In addition to the handling and stability ratings from Consumers Union, other organizations routinely test and rate the handling and stability performance of vehicles. These ratings programs have brought about important improvements in vehicle stability. For example, the Swedish consumer magazine *Teknikens Varld* regularly tests the handling and stability of vehicles in test maneuvers that simulate motorists having to make sudden lane change maneuvers to evade moose in the road. Moose-vehicle impacts are a source of serious and fatal injuries in many Scandinavian countries and elsewhere in the world. In 1997 this organization tested the newly introduced small A-class car made by Daimler-Benz. During the test the vehicle rolled over, and the magazine published the results with the obvious criticism of the vehicle's stability.

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[4] Anders Lie & Claes Tingvall, *How Do EuroNCAP Results Correlate with Real-Life Injury Risks?*, 3 Traffic Inj. Prevention 288 (2002).

Unlike Suzuki, Daimler-Benz did not think litigation was the solution to this problem. Instead it halted production of the A-class and reengineered the car's suspension and installed electronic vehicle stability systems.[5]

Increased Seat Belt Use. Vehicle ratings programs encourage manufacturers to introduce innovations in vehicle safety systems that are not required by governmental safety standards. The EuroNCAP program recently has begun providing vehicle manufacturers with an incentive to adopt seat belt reminder systems that encourage vehicle occupants to use their seat belts. The systems are especially targeted to people who forget to buckle up or for whatever reason use a belt only occasionally. Recent Institute research has shown that the seat belt reminder system introduced by Ford in some 2000 models, most 2001 models, and all 2002 models in the United States has raised belt use among drivers of those vehicles to 76 percent, compared with 71 percent among drivers of vehicles without the system.[6] By encouraging manufacturers to voluntarily install these systems, independent vehicle ratings programs can bring about an improvement in seat belt use rates.

Improved Pedestrian Protection. EuroNCAP has begun testing vehicles to measure how well they provide protection to adult and child pedestrians struck at 25 mph. Various impact sites on the front of the car are rated fair, weak, or poor, and the vehicles are assigned a separate star

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[5] Niki Lauda, Fastlane.com, *A-Class is Safe in All Situations*, (Dec. 18, 1997), *at* http://www.fastlane.com.au/News/A-class.htm. *See also*, Mercedes-Benz, *New Chassis Tuning at* http://www.mercedes-benz.com/ e/cars/a-class/fahrwerk.htm, (on www as of Aug. 17, 2003) (on file with Ins. Inst.).

[6] Allan F. Williams, JoAnn K. Wells & Charles M. Farmer, *Effectiveness of Ford's Belt Reminder System in Increasing Seat Belt Use*, 8 Inj. Prevention at 293 (2002).

rating for pedestrian protection. Because of these EuroNCAP tests, manufacturers are implementing more pedestrian-friendly designs, not only on models sold in Europe but also on vehicles sold in the United States. For example, the 2001 Honda Civic earned the highest rating given thus far by EuroNCAP for pedestrian protection, and most of the improvements incorporated in those vehicles also are found in Civics sold in the United States.[7]

Improved Infant and Child Restraints and Attachment Systems. Independent ratings programs have been a valuable source of information to consumers about the safety of child restraints. Since the early 1970s Consumers Union has conducted simulated crash tests of child restraints to provide consumers with information about the relative performance of those restraints in providing protection to children.[8] At the time Consumers Union began its testing, the existing federal motor vehicle safety standard did not use a simulated crash test to evaluate child and infant restraint performance. It was nearly 10 years after Consumers Union began its testing that such a test was required by the federal government.[9]

The Institute recently evaluated the federally required special attachments designed to make it easier to anchor

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[7] E-mail from Yoshiji Kadotani, Chief Engineer & Technical Representative for Safety, American Honda Motor Co., Inc., to Joseph Nolan, Vice President, Research, Ins. Inst. (Sept. 4, 2003, 17:59 EST) (on file with Ins. Inst.). *See also*, Richard Truett, *Protecting Pedestrians*, Automotive News DESIGN, http://www.autonews.com/article.cms?articleID=45045&a=a&bt=pedestrians&arc=n (Sept. 8, 2003).

[8] *Crash Tests of Car Safety Restraints for Children*, Consumer Rep., Aug. 1972, at 484.

[9] The original child restraint standard (49 C.F.R. § 571.213) went into effect on April 1, 1971. Dynamic testing was not required until January 1, 1981, (48 Fed. Reg. 36849) (Aug. 15, 1983).

infant and child restraints in vehicles. In its study of 50 vehicles, the Institute found that the new federal rule is helping, but not solving, infant and child restraint installation problems.[10] As a part of its overall evaluation of new vehicles, Consumers Union also is evaluating the ease of use of infant and child restraints in vehicles.[11] By identifying the relative ease of use of the various infant and child restraint attachment systems by make and model of vehicle, the Institute and Consumers Union ratings programs will bring pressure on manufacturers to improve those designs.

II. VEHICLE RATINGS PROGRAMS PROMPTLY IDENTIFY SAFETY-RELATED DEFECTS, ALLOWING MANUFACTURERS TO TAKE IMMEDIATE REMEDIAL ACTION.

In addition to bringing about improvements in vehicle designs, vehicle ratings programs have identified safety-related defects in vehicles. These findings have lead to recalls of those vehicles. For example, the Institute recently tested the 2004 Toyota Sienna in a 40 mph frontal offset crash test and discovered a leak from the fuel tank after the crash. As a result, Toyota identified a manufacturing problem and recalled more than 34,000 Siennas to replace the fuel tanks in those vehicles. Likewise, Isuzu recalled more than 18,000 of its 2000 and 2001 Trooper models to correct

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[10] News Release, Insurance Institute for Highway Safety, *LATCH Systems for Child Restraints Aren't Always a Snap: Not Every Child Restraint Will Work in Every Vehicle*, (June 11, 2003) (on file with Ins. Inst.).

[11] Statement of David Pittle, Consumers Union Senior Vice President for Technical Policy, Nat'l Highway Traffic Safety Administration, Ease-of-Use Press Conference, (June 11, 2003), *available at* http://www.nhtsa.dot.gov/real/pc061103.html.

a fuel line defect identified in the Institute's 40 mph frontal offset crash. Jeep recalled 102,000 of its 2002 Liberty models and Nissan recalled more than 116,000 of its 2002 Altima models to fix airbag problems identified in the Institute's offset crash test. Volkswagen recalled more than 36,000 of its 1999 Golf and Jetta models to fix a fire-related problem with the insulation that was detected in an Institute crash test.[12] Finally the National Highway Traffic Safety Administration is investigating a potential safety-related problem with the fuel tanks of 2004 Mazda6 vehicles.[13] The potential problem was identified during a pre-crash inspection of the vehicle by Institute staff. By identifying these safety-related defects, the Institute's vehicle ratings program has brought pressure on manufacturers to initiate safety-related recall campaigns that will bring about prompt corrections of the problems.

III. LITIGATION COSTS PUT INDEPENDENT RATINGS PROGRAMS AT RISK.

As demonstrated above, independent vehicle testing and ratings programs provide significant benefits to the public by encouraging vehicle manufacturers to make safety improvements to their vehicles. As a result of the Institute's well-publicized frontal offset crash test program, EuroNCAP, Australian NCAP, and the Japanese NCAP,

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[12] Nat'l. Highway Traffic Safety Admin., http://www-odi.nhtsa.dot.gov/cars/problems/recalls/results.cfm. NHTSA Campaign ID Nos. 03V291000 (Sienna); 00V376000 (Trooper); 01V373000 (Liberty); 02I001000 (Altima); 99V022000 (Golf and Jetta). *See also*, Letter from Toyota Motor North America, Inc. to the Nat'l. Highway Traffic Safety Admin. (Aug. 11, 2003) (on file with Ins. Inst.).

[13] Telephone interview with William Duckwitz, Safety Defects Specialist, the Nat'l. Highway Traffic Safety Admin., Office of Defects Investigation (Sept. 9, 2003).

there have been significant improvements in the structural and restraint system performances of vehicles. EuroNCAP also is promoting the installation of reminder systems to promote belt use and increase pedestrian protection in vehicle impacts. Consumers Union and Institute tests of infant and child restraints and their vehicle attachment points will help bring about improvements to make it easier to attach restraints to vehicles. Ratings programs also have been a valuable source of information to the National Highway Traffic Safety Administration on vehicle-related defects. Finally, handling and stability programs conducted by Consumers Union and others are putting pressure on manufacturers to reduce the rollover propensity of their vehicles.

All of these important public benefits would be jeopardized if objective ratings programs are subjected to the threat of essentially frivolous lawsuits by manufacturers whose vehicles do not perform well. As long as the programs disclose their test procedures and there is no competent evidence of deliberate misrepresentation of results, they should not be subject to prolonged and expensive litigation. In his dissent in *Suzuki Motor Corp. v. Consumers Union*, Judge Kozinksi correctly set out the dilemma faced by Consumers Union, the Institute, and other testing and ratings organizations and the consequences for consumers:

> If CU can be forced to go to trial after this thorough and candid disclosure of its methods, this is the death of consumer ratings: It will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury. The ultimate losers will be American consumers denied access to independent information about the safety and usefulness of products they buy with their hard-earned dollars. Pet. App. 49a-50a.

To preserve the ability of independent organizations to provide the public with objective information about the relative performance of different vehicles, the Institute requests the Court to grant Consumers Union's Petition for Certiorari and to overturn the decision of the United States Court of Appeals for the Ninth Circuit.

CONCLUSION

The Court should issue a Writ of Certiorari as requested by Consumers Union.

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I hereby certify that on this 18th day of September, 2003, I served three copies of the foregoing brief of *amicus curiae* upon the parties by first class mail, postage prepaid to the following:

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CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORP.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CONSUMER FEDERATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE CONSUMER FEDERATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

This brief is filed on behalf of the Consumer Federation of America ("CFA"), a nonprofit umbrella organization of 300 local, state, and national consumer groups from all 50 states and the District of Columbia. A full list of CFA's members is included in the Appendix hereto. CFA's constituent member organizations count more than 50 million individuals in their collective membership.

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

On behalf of its members, CFA gathers, analyzes, and disseminates information about a range of consumer issues to the public, Congress, and federal agencies. CFA seeks to provide a voice for the concerns of consumers, particularly those of limited means. Many of CFA's members evaluate consumer products and publish reports detailing the results of their studies; those reports are often critical of the products reviewed.

The ability of CFA and its members to provide important information to the public about products and services in the marketplace would be jeopardized if they were forced to absorb the costs of defending at trial against meritless product disparagement and libel suits. Therefore CFA and its members have a keen interest in the standard to be applied on review of motions for summary judgment in such actions.

INTRODUCTION AND SUMMARY

This action concerns the proper standard for reviewing an order of summary judgment in favor of a media defendant in a product disparagement or libel case. The factual background and procedural history of this case are set forth in detail in the Petition and in the decision of the Ninth Circuit, 330 F.3d 1110, 1127 (9th Cir. 2003), Pet. App. 1a, and *amicus* incorporates and adopts those statements by reference.

A summary judgment standard in product disparagement and libel cases that facilitates the dismissal of meritless actions before trial is vital to the functioning and survival of organizations that comment on consumer products. This Court has not previously had the occasion to clarify this standard, and it should do so now.

In *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Court held that, after the trial in a defamation action concerning a public figure, courts must make an "independent review" of the "whole record" to determine whether "clear and convincing evidence" of "actual

malice" exists per *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). *Bose* did not address the central question at issue here: whether courts must conduct such independent review of the evidence when deciding a media defendant's motion for summary judgment.

Independent review of the evidence before trial—which the Ninth Circuit held is not permitted—is critical to the ability of organizations that comment on consumer products to perform their important watchdog function. The Ninth Circuit's view that the *Bose* rule applies only to "the review of a judgment rendered after trial" (330 F.3d at 1133 n.10, Pet. App. 16a n.10) condemns consumer organizations to defending all but the most frivolous product disparagement and libel actions through trial, rather than obtaining dismissal of unfounded actions in advance of trial. Forcing consumer organizations to face a trial before the court may independently review the entire record (even after a full summary judgment record has been established) is a pointless and expensive exercise that will only encourage such litigation against product reviewers. As Judge Kozinski noted in his dissent from the Ninth Circuit's denial of rehearing *en banc*, "[i]f Suzuki can get to trial on evidence this flimsy, no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics." 330 F.3d at 1121, Pet. App. 69a.

In Part I we explain the damage that the Ninth Circuit's ruling will do to the many organizations that comment on consumer products. In particular, we explain the importance of the summary judgment standard to consumer-organization defendants in product disparagement actions, for which the expense of even a single trial could mean their demise.

In Parts II and III we discuss several aspects of the Ninth Circuit's ruling that are particularly troubling for consumer organizations. In Part II we explain that the Ninth Circuit's reliance on Petitioner's financial position as evidence that Petitioner had a motive to embellish its Suzuki Samurai study

sets a dangerous precedent that will permit courts to use a defendant's finances, standing alone, as possibly determinative evidence of product disparagement or libel. In Part III we show that First Amendment principles cannot be squared with the Ninth Circuit's view that Petitioner's failure to explain to the court's satisfaction why the results of its Samurai study differed from the government's conclusions constitutes possibly determinative evidence that Petitioner may have purposefully avoided the truth. Consumer organizations should not stand trial simply because a court is not convinced that they have fully explained why the results of their studies are not in line with the views of the government.

ARGUMENT

I. A Summary Judgment Standard That Permits District Courts To Dispose of Cases Where a Jury Verdict in Favor of the Plaintiff Would Not Survive the Court's Independent Review of the Evidence Is Important to Organizations That Comment on Consumer Products.

The Ninth Circuit's conclusion that courts may not independently review the whole record when considering motions for summary judgment in product disparagement and libel actions would have far-reaching, negative implications for the many organizations that comment on consumer products. Such a rule would limit the ability of media defendants to dispose of such claims at a relatively early stage of litigation. It would subject those organizations—many of which are poorly funded and could not survive the expense of even a single substantial libel trial—to the continued threat of libel suits, any one of which could effectively drain its entire budget. And the prospect of expensive libel trials may limit the vigor with which consumer organizations perform their valuable roles. For all of these reasons, certiorari is warranted.

A. There are a large number of organizations that test and comment on consumer products. These organizations range from giant media conglomerates to well-known product reviewers (such as Petitioner), to national organizations that review a limited range of products and services (such as AARP), to many local organizations that review particular types of products (such as many of CFA's members).

These organizations are often short on funds, and they rely on year-round fundraising campaigns to ensure their continued viability. See Stephen Brobeck, *Fund-Raising*, *in* Encyclopedia of the Consumer Movement 283, 283–85 (Stephen Brobeck ed., 1997). The prime "commodity" offered by these consume organizations is their unbiased judgment about the value of products, services, or other government or private initiatives. In contrast, the products that consumer organizations test and review are typically offered by large, well-funded corporations with significant litigation budgets. Those product producers have substantial incentives to bring lawsuits as one method of defending their products against damaging criticism, whether the product review at issue was actionable or not. The incentive for a product manufacturer to defend itself through litigation is especially great when the target of the action is a small, poorly funded consumer organization that may not be able to afford the costs of defending itself. See Robert O. Herrmann & Robert N. Mayer, *U.S. Consumer Movement: History and Dynamics*, *in* Encyclopedia of the Consumer Movement 584, 599 (Stephen Brobeck ed., 1997) ("[T]he organizations of the consumer movement constantly face the problem[] of financial insecurity * * *. Even those organizations that have established a relatively firm financial base usually cannot match resources with business-financed opponents.").

This incentive for product manufacturers to litigate negative product reviews is particularly troublesome because of the great cost of defending such actions. By some estimates, taking a libel case to trial costs a defendant four

times as much as if the matter is resolved on summary judgment. See Donald M. Gillmor, Power, Publicity, and the Abuse of Libel Law 130–31 (1992); see also Roselle L. Wissler *et al.*, *Resolving Libel Disputes Out of Court: The Libel Dispute Resolution Program*, *in* Reforming Libel Law 286, 287 (John Soloski & Randall P. Bezanson eds., 1992) ("[T]he main economic impact of libel on the media today is the high cost of defending a seriously litigated suit. To defend such a suit through trial typically costs the media $150,000.") (footnote omitted).

B. The high costs of taking a libel case to trial makes summary judgment a particularly important procedural device in such actions. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses * * *." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323–24 (1986). Summary judgment "'allows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to husband scarce judicial resources.'" 11 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 56.02, at 56-20 (2003) (citation omitted). As another group of commentators put it: "Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement the objectives of Fed.R.Civ.P. 1—the just, speedy, and inexpensive resolution of litigation." William W. Schwarzer *et al.*, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 445 (1991). Accordingly, "[s]ummary judgment has become recognized * * * as a procedure for avoiding unnecessary trials on insufficient claims or defenses * * *." *Id.* at 451.[2] Indeed, "defendants in libel cases depend on

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[2] As one of the seminal articles on summary judgment stated: "Except where a trial is necessary to settle an issue of fact, the whole judicial process is, by [the summary judgment] procedure, made to function more quickly and with less complexity than in the ordinary long drawn out

summary judgment to quickly and (relatively) cheaply dispose of most libel cases." Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process, in Libel Litigation*, 58 Ohio St. L.J. 1753, 1764 (1997–1998).

The Ninth Circuit's rule, which makes summary judgment more difficult to obtain in product disparagement and libel cases, would undermine *Sullivan*, which provides heightened protection to speech about public figures. The significant costs associated with taking libel suits to trial could force consumer organizations to spend most—or all—of their limited budgets defending even meritless suits at trial. Libel insurance provides only limited relief for some consumer organizations, as it is expensive and not universally available. And such insurance is often not renewed—or its cost increases dramatically—once an insurer is forced to incur the costs of a libel trial.

Finally, the risk of facing the costs of a libel trial will inevitably lead consumer organizations to attempt to limit their exposure by publishing fewer articles that are substantially critical of consumer products and services and by soft-pedaling the legitimate problems and inadequacies that their research uncovers. This chilling of the valuable work that consumer organizations perform would create "an atmosphere in which the First Amendment freedoms cannot survive." *Sullivan*, 376 U.S. at 278.

II. The Ninth Circuit's Reliance on Petitioner's Financial Situation Is Dangerous to Consumer Organizations and to the Public Interest in Candid Product Evaluations.

The Ninth Circuit panel majority permitted Suzuki to use evidence of a particular financial outlay by Petitioner as possibly determinative evidence in favor of a finding that

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suit." Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 423 (1929).

Petitioner had acted with actual malice. 330 F.3d at 1127 n.1 & 1135–36, Pet. App. 3a n.1 & 22a. It concluded that while "financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry." 330 F.3d at 1136, Pet. App. 22a. The panel added that "[t]he fact that CU needed to boost its revenues to complete its capital campaign lends credence to Suzuki's contention that CU rigged the Samurai testing to produce the predetermined rollover result." 330 F.3d at 1136, Pet. App. 22a–23a.

These conclusions are contrary to *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), in which this Court held that a media defendant's "motive in publishing a story," including "to increase * * * circulation" or "to increase its profits" "cannot provide a sufficient basis for finding actual malice." *Id.* at 665, 667. The Ninth Circuit tried to side-step *Harte-Hanks* by stating that Petitioner's financial motive was simply "a relevant factor" that "dovetails" with the other evidence. 330 F.3d at 1136, Pet. App. 22a. But if financial motive is not sufficient by itself to show actual malice, it certainly cannot be sufficient to tip the scales in favor of such a finding when combined with other evidence of alleged actual malice, thus providing a ground for denying summary judgment in favor of the defendant.

This holding also has important negative consequences for consumer organizations. It means that the often tenuous financial position of consumer groups—which they face by the very nature of the work they perform—will always be relevant and perhaps outcome-determinative evidence of an intention to exaggerate results that disparage the products being reviewed and to disregard evidence that an organization's conclusions are false. Consumer organizations will therefore automatically have one strike against them in product disparagement and libel actions. And this negative inference will exist regardless of whether the organization's finances have any direct connection to the review of the

product at issue. It would be extraordinarily damaging to First Amendment values to force an organization to undergo an expensive trial simply because there exists some evidence that the organization has financial difficulties. That result goes a long way towards making the freedom on speech protected by the First Amendment a perquisite of the rich alone. Certiorari is warranted to correct this error by the Ninth Circuit.

III. The Ninth Circuit's Reliance on the Existence of an Inconsistent Government Report Is Dangerous to Consumer Organizations and to the Public Interest in Candid Product Evaluations.

The Ninth Circuit also concluded that Petitioner failed to adequately explain why it relied on human drivers to test the Samurai, when the National Highway Traffic Safety Administration ("NHTSA") had criticized such testing methods. The court found this discrepancy to be evidence warranting a trial whether Petitioner "purposely avoided the truth." 330 F.3d at 1136, Pet. App. 24a. In particular, the Ninth Circuit concluded that even though Petitioner "challenged the NHTSA report head on, stating its disagreement in detail and supporting its alternative conclusions with substantive justifications," it nonetheless did not "respond to the criticism of its testing procedures as overly influenced by driver input." 330 F.3d at 1138, Pet. App. 28a.

This conclusion simply cannot be consistent with the First Amendment. Consumer organizations do not exist merely to replicate the testing procedures the government may prefer. Similarly, they should not be required to stand trial simply because their tests do not match those preferred by the government, or because they do not sufficiently explain why they used different testing procedures. Here, Petitioner disclosed fully its testing procedures. Petitioner did not report testing that had never occurred or falsify the results of its tests. If a reader was interested in whether Petitioner's

testing protocol differed from that preferred by the government and whether that protocol made sense, all they needed to do was review Petitioner's report. This disclosure satisfies any legitimate expectation that a product manufacturer could have concerning the truthfulness of a product review such as that at issue here. As Judge Kozinski noted, "[t]he appropriate response to a poorly designed experiment is to conduct a better one and then convince people that your method is more accurate—not to sue the other guy into silence." 330 F.3d at 1121, Pet. App. 68a.

This issue has significant ramifications for all product reviewers. After the Ninth Circuit's decision, reviewers will risk an expensive trial if they neither replicate the government's testing techniques nor satisfy a court that they were justified in testing a different way. That standard cannot be squared with the First Amendment's commitment to robust debate. For this additional reason, certiorari is warranted to correct the Ninth Circuit's unprecedented decision.

CONCLUSION

For the reasons set forth in the Petition and above, this Court should grant the petition for writ of certiorari.

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APPENDIX
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1st Credit Union (MO)
1st Rochdale Cooperative Group, Ltd. (NY)
AARP
Aiken Electric Cooperative (SC)
Alabama Arise
Alabama Municipal Electric Authority
Alabama Rural Electric Association
Alabama Watch
Alaska Public Interest Research Group
Alliance Credit Union (CA)
Alliance for Retired Americans
American Association of Homes and Services for the Aging
American Council on Consumer Awareness
American Council on Consumer Interests
American Homeowners Grassroots Alliance
American Public Health Association
American Public Power Association
Arizona Consumers Council
Arizona Credit Union League
Arkansas Credit Union League
Arkansas Federal Credit Union
Arkansas Public Policy Panel
Association of Louisiana Electric Cooperatives
Basin Electric Power Cooperative (ND)
Bay Ridge Consumer Federation (NY)
Bayer Credit Union (MO)
Bread for the World Institute
Broward County Consumer Affairs Division (FL)
Bucks County Consumer Protection (PA)
California Consumer Affairs Association
California Department of Consumer Affairs
California Labor Federation AFL–CIO
California & Nevada Credit Union Leagues

California Public Interest Research Group
Campaign for Tobacco–Free Kids
Carolina Collegiate Federal Credit Union (SC)
Carolina Foothills Federal Credit Union (SC)
Center for Auto Safety
Center for Community Self–Help
Center for Economic Justice
Center for Economic Progress
Center for Insurance Research
Center for Justice and Democracy
Center for Public Interest Law
Center for Science in the Public Interest
Center for the Study of Services
Central Electric Cooperative (SD)
Central Power Electric Cooperative (ND)
Champaign County Health Care Consumers (IL)
Chartway Federal Credit Union (VA)
Chicago Consumer Coalition
Citizen Equity First Credit Union (IL)
Citizen's Utility Board of Oregon
City of Anaheim Public Utilities (CA)
City of Detroit Consumer Affairs Department
City of Mesa, Utilities Department (AZ)
City Utilities of Springfield (MO)
Cleveland Consumer Action
Coalition for Consumer Rights
Coastal Federal Credit Union (NC)
Colorado Credit Union League
Colorado Public Interest Research Group
Colorado Rural Electric Association
Columbia Consumer Education Council (SC)
Community Action Partnership of Mercer County (PA)
Connecticut Public Interest Research Group
Consumer Action
Consumer Assistance Council
Consumer Credit Counseling Service of St. Louis, Inc. (MO)
Consumer Energy Council of America

Consumer Federation of California
Consumer Fraud Watch
Consumer League for Education and Reform
Consumer Protection Association
Consumers Cooperative Society of Santa Monica (CA)
Consumers for Auto Reliability and Safety
Consumers for Auto Reliability and Safety Federation
Consumers League of New Jersey
Consumers League of Ohio
Consumers Union
Consumers Union/Southwest Regional Office (TX)
Consumers United Association
Consumers United/Minnesotan's for Safe Foods
Council of New York Cooperatives & Condominiums
Credit Union Executives Society
CUNA and Affiliates
CUNA Credit Union (WI)
CUNA Mutual Group (WI)
Defense Credit Union Council
Democratic Processes Center
Department of Family & Consumer Studies (UT)
Disability Policy Consortium
District of Columbia Credit Union League
East River Electric Power Cooperative (SD)
Economic Justice Institute
Empire State Consumer Association
ESL Federal Credit Union (NY)
Families Advocating Injury Reduction
Family Trust Federal Credit Union (SC)
First Missouri Credit Union
Florence Educators Federal Credit Union (SC)
Florida Action Coalition Team
Florida Attorney General's Office
Florida Consumer Action Network
Florida Credit Union League
Florida Department of Agriculture and Consumer Services
Florida Electric Cooperatives Association

Florida Funeral & Cemetery Consumer Advocacy
Florida Municipal Electric Association
Florida Public Interest Foundation
Florida Public Interest Research Group
Food & Allied Service Trades
Food Research and Action Center
FreedomFirst Credit Union (VA)
Ft. Collins Light & Power Utility (CO)
Fund Democracy, Inc.
Funeral Consumers Alliance
Georgetown Kraft Credit Union (SC)
Georgia Public Interest Research Group
Greater Lawrence Community Action Council, Inc. (MA)
Greenbelt Consumer Cooperative (MD)
Group Health Cooperative (WA)
HALT
Handgun Control
Harbour Credit Counseling Services, Inc. (VA)
Harlem Consumer Education Council
Heartland Community Credit Union (MO)
Hillsborough County Consumer Protection Agency (FL)
Human Solutions
Idaho Consumer Affairs
Illinois Credit Union League
Illinois PIRG Education Fund
Indiana Credit Union League
Indiana Statewide Association of Rural Electric Cooperatives
International Association of Lemon Law Administrators
Iowa Association of Municipal Utilities
Iowa Credit Union League
Iowa Public Interest Research Group
Kalamazoo District Bell Federal Credit Union (MI)
Kansas City Neighborhood Alliance (MO)
Kansas Credit Union Association
Kansas Municipal Utilities
Kids In Danger
Laclede Family Savings Credit Union (MO)

Lafayette Utilities System (LA)
Legal Services of North Florida
Liberty Federal Credit Union (SC)
Lincoln Electric System (NE)
Lockheed Federal Credit Union (CA)
Lyon-Lincoln Electric Cooperative, Inc. (MN)
Maryland Consumer Rights Coalition
Maryland Public Interest Research Group
Massachusetts Consumers' Coalition
Massachusetts Credit Union League
Massachusetts Office of Consumer Affairs and Business Regulation
Massachusetts Public Interest Research Group
Mazuma Credit Union (MO)
MCAS Beaufort Federal Credit Union (SC)
McCoy Federal Credit Union (FL)
Mecklenburg Electric Cooperative (VA)
Michigan Consumer Federation
Michigan Municipal Electric Association
Michigan State AFL–CIO
Mid–West Electric Consumers Association
Minnesota AFL–CIO
Minnesota Credit Union Network
Minnesota Municipal Utilities Association
Minnesota Public Interest Research Group
Minnesota Valley Cooperative Light and Power Association
Missouri Central Credit Union
Missouri Credit Union Association
Missouri Public Interest Research Group
Missouri River Energy Services (SD)
Missourians for Affordable Reliable Energy Service
Montana Public Interest Research Group
Montgomery County Division of Consumer Affairs (MD)
Moorhead Public Service (MN)
Municipal Electric Systems of Oklahoma
National Association of Consumer Advocates
National Association of Consumer Agency Administrators

National Association of Federal Credit Unions
National Association of Housing Cooperatives
National Association of Unclaimed Property Administrators
National Center for Appropriate Technology
National Center on Poverty Law
National Citizens Coalition for Nursing Home Reform
National Consumer Law Center
National Consumers League
National Cooperative Bank
National Cooperative Business Association
National Farmers Union
National Low Income Housing Coalition
National Rural Electric Cooperative Association
National Rural Telecommunications Cooperative
Navy Federal Credit Union (VA)
New Jersey Public Interest Research Group Citizen Lobby
New Mexico Public Interest Research Group
New York Citizens Utility Board
New York City Board of Education Employees, Local 372
New York City Department of Consumer Affairs
New York City Consumer Assembly
New York Public Interest Research Group
Niagara Frontier Consumer Association (NY)
North Carolina Association of Electric Cooperatives
North Carolina Consumers Council
North Carolina Hunger Network
North Carolina Justice & Community Development Center
North Carolina Public Interest Research Group
North Dakota Association of Rural Electric Cooperatives
Northeast Public Power Association
Northwestern Rural Electric Cooperative Association (PA)
NRL Federal Credit Union (MD)
Nutritional Resource Center
Ohio Consumers' Counsel
Ohio Municipal Electric Association
Ohio Public Interest Research Group
Ohio State AFL–CIO

Oklahoma Association of Electric Cooperatives
Orange County Teachers Federal Credit Union (CA)
Oregon Consumers League
Oregon State Public Interest Research Group
ORNL Federal Credit Union (TN)
PACE, International Union
Palmetto Citizens Federal Credit Union (SC)
Pennsylvania Credit Union Association
Pennsylvania Public Interest Research Group
Pentagon Federal Credit Union
Public Interest Research Group in Michigan
Public Utility Law Project of New York
Purina Credit Union (MO)
Quackwatch (PA)
Renville–Sibley Cooperative Power Association (MN)
Rhode Island Public Interest Research Group
Royal Oakland Community Credit Union (MI)
S.T.O.P.–Safe Tables Our Priority
SAC Federal Credit Union (NE)
Salt River Project (AZ)
Service Employees International Union
SHISA (FL)
South Carolina Credit Union League
South Dakota Credit Union League
South Dakota Rural Electric Association
Southeastern Electric Cooperative, Inc. (SD)
SRP Federal Credit Union (SC)
St. Louis Community Credit Union (MO)
St. Louis Postal Credit Union (MO)
St. Paul Postal Employees Credit Union (MN)
State Department Federal Credit Union
State of Connecticut Department of Consumer Protection
Sumter Electric Cooperative (FL)
Tallahassee–Leon Federal Credit Union (FL)
Tennessee Valley Public Power Association
Texas Alliance for Human Needs
Texas Citizen Action

Texas Consumer Association
Texas Credit Union League
Texas Legal Services Center
Texas Low Income Housing Information Service
Texas Watch
The Consumer Alliance
The Danny Foundation
The Newspaper Guild of New York, AFL–CIO, Local 3
Tower Federal Credit Union (MD)
Treasury Department Federal Credit Union
U.S. Federal Credit Union
UCAN/Privacy Rights Clearinghouse
Union of Needletrades, Industrial & Textile Employees
UNITE Southwest Credit Union (MO)
United Association of Plumbers & Pipefitters
United Auto Workers
United Auto Workers, Local 2195
United Auto Workers, Local 599
United Food and Commercial Workers International Union
Vantage Credit Union (MO)
Vermont Public Interest Research Group
Victim's Committee for Recall of Defective Vehicles
Violence Policy Center
Virginia AFL–CIO
Virginia Citizens Consumer Council
Virginia Credit Union League
W.E. Morris Institute for Justice
Washington Credit Union League
Washington Public Interest Research Group
Washington Public Utility Districts Association
Waverly Light & Power (IA)
Wells Rural Electric Company (NV)
Wescom Credit Union (CA)
West River Electric Association (SD)
West Virginia Credit Union League
Western Fuels Association
Wisconsin Consumers League

Wisconsin Public Interest Research Group
Wisconsin State AFL–CIO
Woodstock Institute
Wright Patman Congressional Federal Credit Union (DC)
Wyoming Credit Union League